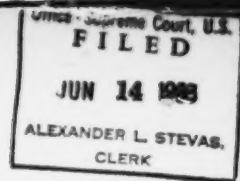


82-6928



NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

=====

ALVIN BERNARD FORD,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Warden,
Florida State Prison, LOUIE L. WAINWRIGHT,
Secretary, Department of Offender Rehabilitation,
State of Florida; JIM SMITH, Attorney General,
State of Florida,

Respondents.

=====

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

=====

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QUESTIONS PRESENTED

1. Does the Florida Supreme Court's systematic, secret, ex parte solicitation and consideration of extra-record, prison-generated psychological evaluations and similar materials of questionable reliability concerning capital appellants in cases pending before it for sentencing review violate the fifth, sixth, eighth and fourteenth amendments?

2. May a death sentence that is based in part upon improperly considered aggravating circumstances be affirmed and executed pursuant to an appellate rule that explicitly disregards evidence of nonstatutory mitigating circumstances?

3. Does the eighth amendment requirement of reliability in capital sentencing permit the sentencer to impose death without any guidance concerning the level of certainty that it must have in determining that sufficient aggravating circumstances exist, that they outweigh mitigating circumstances, and that death is accordingly the appropriate punishment?

4. Did the Eleventh Circuit err in upholding jury instructions that a reasonable juror might well have understood to preclude consideration of nonstatutory mitigating circumstances through:

(i) a disregard of Sandstrom v. Montana, 442 U.S. 510 (1979), thus creating a conflict with the Fifth Circuit's condemnation of identical jury instructions in Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); and

(ii) a failure to recognize that instructional error under Lockett v. Ohio, 438 U.S. 586 (1978), infects a capital sentencing trial with prejudice sufficient to satisfy the requirements of Wainwright v. Sykes, 433 U.S. 72 (1977), and United States v. Prady, 456 U.S. 152 (1982)?

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NO. _____

IN THE

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-v-

CHARLES G. STRICKLAND, JR., Warden,
Florida State Prison, LOUIE L. WAINWRIGHT,
Secretary, Department of Offender Rehabilitation,
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State of Florida,

Respondents.

=====

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

=====

Petitioner, ALVIN BERNARD FORD, prays that a writ of certiorari issue to review the en banc judgment of the United States Court of Appeals for the Eleventh Circuit filed January 7, 1983. Rehearing was denied on March 17, 1983.

CITATIONS TO OPINIONS BELOW

The opinion of the court of appeals is reported at 696 F.2d 804 (11th Cir. 1983), and is set out at pages 1a-80a of the Appendix.^{*/} The order denying rehearing is set out at App. 81a.

JURISDICTION

The judgment and opinion of the court of appeals were filed on January 7, 1982, and petitioner's timely petition for rehearing was denied on March 17, 1983. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

^{*/} Citations to the Appendix accompanying this petition are designated App. ____.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the fifth amendment to the Constitution which provides in relevant part:

No person ... shall be compelled in any criminal case to be a witness against himself ...;

the sixth amendment to the Constitution which provides in relevant part:

In all criminal prosecutions, the accused shall enjoy the right ... to be confronted with the witnesses against him ... and to have the assistance of counsel for his defense;

the eighth amendment to the Constitution which provides in relevant part:

Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the fourteenth amendment to the Constitution which provides in relevant part:

[N]or shall any State deprive any person of life, liberty, or property, without due process of law

It also involves Section 921.141, Florida Statutes (1973), which is set out at App. 82a-83a.

STATEMENT OF THE CASE

A. Course of Prior Proceedings

On July 26, 1974, an indictment was filed in the Circuit Court for the Seventeenth Judicial Circuit, Broward County, Florida, charging petitioner with the July 21, 1974, murder of police officer Dimitri Walter Ilyankoff during the course of the attempted robbery of a restaurant. RPC. 254.^{1/} On

^{1/} References to the various portions of the record relevant to this proceeding are designated as follows:

(a) transcript of the trial in the Circuit Court for the Seventeenth Judicial Circuit of Florida, held December 9-18, 1974, as "T";

(b) record on appeal to the Supreme Court of Florida following the denial of post-conviction relief as "RPC";

(c) orders of the District Court and other documents filed in the District Court, as "R"; and

(d) a supplement to the foregoing District Court record, known as the "FIRST SUPPLEMENTAL RECORD ON APPEAL," as "SR."

December 17, 1974, following an eight-day trial, petitioner was convicted of murder in the first degree. T. 1300-1301. On January 6, 1975, following a jury recommendation of death, Mr. Ford was sentenced to death.

The Supreme Court of Florida affirmed the conviction and death sentence on July 18, 1979, and denied rehearing on September 24, 1979. Ford v. State, 374 So.2d 496 (Fla. 1979); App. 84a-91a. On April 14, 1980, certiorari was denied. 445 U.S. 972 (1980).

It was subsequently discovered that, in connection with its appellate review of capital cases, the Florida Supreme Court had, ex parte, regularly solicited and reviewed prison-generated psychological reports and similar evaluations of death-sentenced inmates. On September 29, 1980, Mr. Ford joined with 122 other capital defendants in filing an application for extraordinary relief and petition for writ of habeas corpus in the Florida Supreme Court challenging this practice. That court dismissed the application for failure to state a claim upon which relief could be granted. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981); App. 92a-99a. This Court denied certiorari. 454 U.S. 1000 (1981).

Mr. Ford then commenced state post-conviction proceedings. His motion for post-conviction relief pursuant to Fla. R. Crim. P. 3.850 was denied by the Circuit Court in Broward County, and its denial was affirmed by the Supreme Court of Florida. Ford v. State, 407 So.2d 907 (Fla. 1981); App. 100a-103a. His subsequent petition for habeas corpus in the United States District Court for the Southern District of Florida was denied in an unreported order and opinion, App. 104a-118a, and Mr. Ford appealed. On April 15, 1982, a divided panel of the Eleventh Circuit affirmed the District Court's denial of relief. Ford v.

Strickland, 676 F.2d 434 (11th Cir. 1982); App. 119a-141a.

Rehearing en banc was granted. The en banc court -- despite sharp division over four of the seven issues presented -- affirmed the district court's judgment. Ford v. Strickland, 696 F.2d 804 (11th Cir. 1982); App. 1a-80a. Further rehearing was denied. App. 81a.

B. Facts Relevant to the Questions Presented

This petition seeks review of a crucial decision issued by the Eleventh Circuit en banc "for the purpose of resolving for this Circuit several important issues that repeatedly arise in capital cases." App. 4a.^{2/} The issues were the subject of sharp division within the en banc court below. The facts giving rise to each issue are set forth seriatim.

- (1) Petitioner's Challenge to the Florida Supreme Court's Ex Parte Solicitation, Receipt, and Consideration of Evaluative Materials Concerning Capital Defendants Whose Appeals Were Before the Court.

Since at least as early as 1975, the Supreme Court of Florida has, without the knowledge of the appellants or their counsel, requested, received, and considered materials from state executive officials relating to death-sentenced appellants in pending appeals. The existence of this practice has not been disputed by respondents or the Florida court. Nor can it be in light of the extensive documentary proof. The only thing not certain is the full extent of the practice, which, because of its secret nature, may never be known.

When the practice came to light, a proceeding was instituted by Mr. Ford and other Florida capital appellants asserting

^{2/} Eleven of the twelve active judges participated in the en banc proceeding. The twelfth, Judge Hatchett, was disqualified because of his participation in Mr. Ford's case while he had been a Justice of the Supreme Court of Florida.

numerous violations of their federal constitutional rights. Since the proceeding complained of conduct by the Supreme Court of Florida, it was filed directly with that court as an application for extraordinary relief and petition for writ of habeas corpus. The petition and its appendices are set out in the Supplemental Appendix.^{3/} Citing considerations of "judicial economy because of the common issues of law and fact presented," Supp. App. 2b, more than a hundred prisoners under sentences of death joined in the petition.

Petitioners alleged that the Supreme Court of Florida

has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes but is not limited to: presentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole investigation reports; probation and state prison classification and admissions summaries

Except as to some of the presentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys.

Supp. App. 2b-3b. An appendix to the petition documented the practice with copies of correspondence from the Office of

^{3/} An attempt was made to introduce the materials contained in the Supplemental Appendix into the record in Mr. Ford's case in the district court. It was, however, foreclosed by the district judge, who stated that he was "only interested in this case, and all that about other cases is totally irrelevant." SR. 9. Nonetheless, because the Supplemental Appendix contained only the pleadings filed in the Florida Supreme Court, the court of appeals below treated those materials as properly before it.

References to the Supplemental Appendix are designated as Supp. App. ____.

the Clerk of the Supreme Court of Florida to officials of the Department of Corrections requesting "the latest psychiatric evaluation" of named capital appellants, Supp. App. 81b, 93b, 95b, 101b, 104b, 106b, 108b, 110b, 115b, and 118b; return correspondence from Department of Corrections officials transmitting the requested information, Supp. App. 58b, 64b, 82b, 93b, 96b, 98b, 102b, 105b, 107b, 109b, 111b, 114b, 117b, and 119b; and notations of telephone requests by the Clerk for similar information, Supp. App. 33b, 40b, 50b, 51b, 55b, 64b, 65b, 70b, and 129b. An example of the correspondence from the Clerk of the Court follows.

Supreme Court of Florida
Tallahassee, 32304

SID A. WHITE
CLERK
BERNICE L. SMILGIN
CHIEF DEPUTY CLERK

February 10, 1978

TELEPHONE
904-431-0125

①

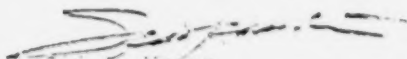
TO: THE CLERK OF THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA 32304
FROM: THE CLERK OF THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA 32304
SUBJECT: RE: SUPPLEMENTAL APPENDIX TO THE
REPORT OF THE CLERK OF THE SUPREME COURT OF FLORIDA
RE: SUPPLEMENTAL APPENDIX TO THE REPORT OF THE CLERK OF THE SUPREME COURT OF FLORIDA

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RE: SUPPLEMENTAL APPENDIX TO THE
REPORT OF THE CLERK OF THE SUPREME COURT OF FLORIDA

Very respectfully,


BERNICE L. SMILGIN
CHIEF DEPUTY CLERK

ENCLOSURE

Supp. App. 118b.^{4/} This documentation was, perforce, "merely exemplary," Supp. App. 3b, because of the secret nature of the communications to and from the court and the fact that "a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it ..., has at the Court's direction been destroyed or purged from [the] . . . Court's files." Id.

The petition asserted that the Florida court's practice violated the petitioners' rights "under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States," Supp. App. 3b, "the right to counsel as guaranteed by the Sixth and Fourteenth Amendments," id., "the Eighth Amendment," id., "the privilege against self-incrimination as guaranteed by the Fifth Amendment," id., and "the right to confrontation as guaranteed by the Sixth Amendment." Id. at 4b. Each of these contentions was briefed. Id. at 4b-13b.

Petitioners moved for the appointment of a special master and for hearings to resolve the factual issues if any of their allegations were materially controverted. But they never were controverted. When the court issued an order to show cause, Supp. App. 184b, the respondent replied by filing a motion to dismiss that neither disputed the facts alleged in the petition nor alleged any contrary facts. Id. at 185b-193b.

4/ As the response to this particular request demonstrates, the Department typically did all it could to provide the "latest" evaluation possible. The Department's response enclosed

... the latest psychiatric report available on [Mr. Francis]. Because there is not a more recent evaluation available, I have requested the staff at Florida State Prison to complete an updated psychological evaluation and forward it to my office. This report should be available in the very near future.

Supp. App. 119b.

After oral argument,^{5/} the Supreme Court of Florida denied the petition on the merits as a matter of law.^{6/} It held that:

Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence.

App. 96a. Drawing a distinction between sentence "review" and sentence "imposition," id.; see also id. at 98a, the court concluded that: "Since we do not 'impose' sentences in capital cases, Gardner^[7/] presents no impediment to the advertent or inadvertent receipt of some non-record information." Id. at 97a. "[N]on-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review.'" Id. at 97a-98a. Accordingly: "As we view the case, . . . appellate review can never be compromised, in the constitutional sense required by Proffitt,^[8/] by the receipt of any quantity of non-record information." Id. at 98a n.16. "The upshot . . . is that petitioner's claims are untenable." Id. at 98a. All relief was denied as to each petitioner. Id.

^{5/} The transcript of the oral argument before the Supreme Court of Florida is contained in Supp. App. 194b-257b.

^{6/} The court criticized the procedure of joining multiple habeas corpus petitioners in a single petition, and said that "[i]n the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily." App. 95a. However, in the present case, "[t]o avoid absurd technicalities," the court "decline[d] to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's petition effectively disposes of all claims for relief of those petitioners who have joined with Brown." Id. The court's final order was that "[t]he petitions of Brown and others for writs of habeas corpus and for other extraordinary relief are denied." App. 98a.

^{7/} Gardner v. Florida, 430 U.S. 349 (1977).

^{8/} Proffitt v. Florida, 428 U.S. 242 (1976).

The Brown petitioners sought review in this Court, but certiorari was denied. Brown v. Wainwright, 454 U.S. 1000 (1981). Dissenting from this denial, Justices Marshall and Brennan recognized that "petitioners might seek to develop the record on these issues further in a federal habeas corpus proceeding." Id. at 1003. Mr. Ford did attempt to develop a fuller record in federal habeas corpus. The district court, however, denied discovery, denied Mr. Ford's proffer of available evidence concerning the Florida Supreme Court's practice, SR. 8-9, and adopted the Florida court's conclusions of law in Brown. App. 110a-111a. On appeal, the Eleventh Circuit disavowed the Florida court's legal conclusions and "assume[d] without deciding that the use by the appellate court of the type of nonrecord material alleged here would be unconstitutional." Id. at 7a (plurality opinion). Nevertheless, it found no violation of Mr. Ford's constitutional rights because it read the Florida Supreme Court opinion in Brown to contain a factual statement that the Florida court had not "used" the nonrecord material. Id. at 7a-8a (plurality opinion); id. at 29a-30a (Tjoflat, J., concurring). Five of the eleven judges participating in the en banc decision dissented. Two judges (Godbold and Clark) found that the Florida Supreme Court had not clearly stated whether it relied on the nonrecord material, id. at 17a-18a; two judges (Kravitch and Johnson) found in separate opinions that the Florida Supreme Court admitted (or failed to deny) an unconstitutional use of the nonrecord material, id. at 42a-50a, 69a-71a; and the fifth judge (Anderson) joined all of the others' dissenting opinions. Id. at 73a.

(2) Petitioner's Challenge to the Florida Rule Permitting the Affirmance of a Death Sentence Based in Substantial Part Upon Legally Improper Aggravating Circumstances When There Are Only Nonstatutory Mitigating Circumstances.

At the sentencing phase of Mr. Ford's trial, the court twice instructed the jury to consider all eight of the aggravating circumstances specified in the Florida death penalty statute. T. 1347-1348, 1354-1356. Thereafter, the jury returned a general advisory verdict recommending the death penalty. T. 1358. The trial judge imposed the death sentence and filed supporting findings in which he found all eight of the statutory aggravating circumstances. App. 88a-90a. On direct appeal, the Florida Supreme Court set aside three of the eight aggravating circumstances: Two had no evidentiary basis, and the third involved an impermissible double-counting of aggravation.^{9/} Nonetheless, the court upheld the imposition of the death sentence, because "there being no mitigating factors present death is presumed to be the appropriate sentence. Elledge v. State, 346 So.2d 998 (Fla.1977); State v. Dixon, [283 So.2d 1 (Fla. 1973)]." Id. at 91a. With respect to its conclusion that there were "no mitigating factors present," the court explained: "We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitiga-

^{9/} Two circumstances -- that the defendant was under sentence of imprisonment when the homicide was committed, Fla.Stat. § 921.141 (5)(a) (West Supp. 1982), and that the defendant had been previously convicted of another capital felony or of a felony involving the use or threat of violence, id., § 921.141 (5)(b) -- were set aside for lack of evidence. App. 89a-90a. Two other circumstances -- that the homicide was committed while defendant was engaged in the attempted commission of a robbery, id., § 921.141 (5)(d), and that the homicide was committed for pecuniary gain, id., § 921.141 (5)(f) -- were reduced to a finding of a single aggravating circumstance since both were based upon the same aspect of the crime. App. 90a-91a.

tion during the sentencing trial.... [But o]ur duty under section 921.141, Florida Statutes (1975), ... is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry to the facts" of the case under review. Id. (emphasis added).

In federal district court, Mr. Ford claimed that the eighth amendment forbade the affirmance of a death sentence when nearly half of the aggravating circumstances supporting it were held improper and the rule relied on to affirm this result denied consideration of nonstatutory mitigating circumstances. The district court rejected this claim with the terse statement that Proffitt v. Florida, 428 U.S. 242, 255 (1976), required that the Florida statutory provisions "be considered as they have been construed by the Supreme Court of Florida." App. 109a-110a.

The en banc Eleventh Circuit affirmed the district court by a seven-to-four majority. The majority accepted without discussion the Florida court's determination that there were "no mitigating factors present." App. 12a and 19a. It did not, therefore, address the constitutionality of an appellate rule ("the Elledge rule") that disregards evidence of nonstatutory mitigating circumstances. Rather, it upheld the application of the Elledge rule in Ford on three grounds: (1) that the sentencer had not considered improper evidence; it merely gave weight to improper considerations based upon otherwise admissible evidence, id. at 11a; (2) that because there were no mitigating circumstances, there was no risk that the sentencer's discretion had been misguided because the Florida Supreme "[C]ourt logically presumed the weighing process would have reached the same outcome even had the

sentencing court not added to the scales those aggravating circumstances found impermissible..., " id. at 12a; and (3) that this presumption "seem[ed] very like the application of a harmless error rule." Id.

In dissent, three judges questioned the Florida court's conclusion that there were no mitigating circumstances. Id. at 36a n.32 and 64a-65a n.44. But they found no need to resolve this issue because of their views either that Zant v. Stephens, 456 U.S. 410 (1982), required certification of a question to the Florida Supreme Court, App. 31a-41a, (Tjoflat, joined by Anderson, JJ., dissenting), or that the decisions on the merits in Zant and Barclay v. Florida, No. 81-6908, cert. granted, ___ U.S. ___, 103 S.Ct. 340 (1982), would so clearly be controlling that decision ought to be deferred. App. 61a-68a (Kravitch, J., dissenting). A fourth dissenter, Judge Johnson, concluded that the Florida Supreme Court's disregard of nonstatutory mitigating circumstances in applying the Elledge rule was a violation of Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). App. 72a-73a.

- (3) Petitioner's Challenge to Florida's Failure to Require That the Sentencer Be Convinced Beyond a Reasonable Doubt That Aggravating Circumstances Outweigh Mitigating Circumstances.

The Florida statute requires that both the jury's recommendation and the judge's sentence of death must be premised on "findings ... as to the facts" that "sufficient aggravating circumstances exist as enumerated in [the statute], and ... [t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Fla.Stat. §§ 921.141(2) and (3) (West Supp. 1982). In Mr. Ford's penalty trial, the

jurors were instructed that they must make these findings before they could recommend death. However, they were not told that they must make these findings beyond a reasonable doubt. T. 1345-1346. Similarly, although the trial judge made these findings before he imposed Mr. Ford's death sentence, he did not indicate that he made them beyond a reasonable doubt. App. 89a-90a n.1.

In the district court, Mr. Ford claimed that the eighth and fourteenth amendments require that these findings be made beyond a reasonable doubt. The district court held merely that "Proffitt v. Florida ... is sufficient itself to reject the claim." App. 109a.

By a nine-to-two vote, the en banc Eleventh Circuit affirmed the district court's conclusion on two grounds. First, the majority reasoned that the determinations made at the penalty trial are not of "facts or elements of the crime" which, under In re Winship, 397 U.S. 358 (1970), require proof beyond a reasonable doubt. App. 15a. Rather, they involve the weighing of facts against each other, a process "not susceptible to proof by either party." Id. Second, because these sentencing determinations are central to Florida's capital punishment scheme which the Court declared constitutional on its face in Proffitt, the majority concluded that adherence to the Florida scheme provided Mr. Ford a constitutionally proper sentencing proceeding. Id.

Dissenting, Judges Anderson and Clark recognized that the determinations made by the jury and judge in a capital sentencing proceeding are not simple "findings of fact" since they involve the weighing of subsidiary facts and the application of a measure of subjective judgment. Id. at 76a and n.6. But they found that difference immaterial, relying on Addington v. Texas, 441 U.S. 418 (1979), and Santosky v. Kramer, 455 U.S. 745 (1982).

To them, the relevant question was the requisite "degree of confidence in the accuracy of the finding that the death penalty is warranted." App. 76a. This Court's insistence that especially reliable "procedures ... govern the sentencing process in a death case," id. at 74a, compelled the dissenters to find that a standard reflecting "subjective certainty" -- i.e., the reasonable doubt standard -- was necessary to guide the critical judgments underlying a decision to impose death. Id. at 78a-80a.

- (4) Petitioner's Challenge to Instructions That Might Well Lead a Reasonable Juror to Conclude That the Jury was Forbidden to Consider Relevant Mitigating Circumstances.

The instructions to the jury at the penalty phase were that:

As to aggravating circumstances, in considering whether sufficient aggravating circumstances exist to justify a sentence of death, you shall consider only the following [whereupon the court read the list of aggravating circumstances specified in the death penalty statute]

As to mitigating circumstances, in considering whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following [whereupon the court read the list of mitigating circumstances specified in the statute]

T. 1347-1349 (emphasis added). During the jury's deliberations, the foreman requested reinstruction concerning the aggravating and mitigating circumstances that the jury could consider. In the exchange that followed: (1) the judge told the foreman that the "list" of factors in the charge constituted "the mitigating and aggravating circumstances" the jurors were to consider; (2) the foreman told the other jurors that the "list" of factors in the charge constituted "what they [the judge and counsel] consider the aggravating circumstances; what they consider the mitigating circumstances;" and (3) the judge then reread to

the jury the entire portion of the instructions specifying the aggravating and mitigating circumstances to be considered. T. 1351-1356 (emphasis added).

In the district court, Mr. Ford claimed that these instructions were calculated to lead a reasonable juror to believe that he or she could consider only the statutory mitigating circumstances enumerated in the instructions. Since the bulk of his mitigating evidence did not relate to the statutory circumstances, these instructions precluded its consideration.

The district court found that, because there was no objection, "Wainwright v. Sykes [, 433 U.S. 72 (1977)] controls." App. 107a. But it went on to determine the merits. It held that any error in the instructions was harmless on two grounds. Id. at 107a-109a. First, unlike the Mississippi death penalty procedure under which a similar jury charge was held unconstitutional in Washington v. Watkins,^{10/} the Florida procedure "has sentencing of death by a judge and the jury's verdict is only advisory." App. 108a. Second, the district court believed that the trial judge would reimpose the death sentence even if Mr. Ford's case were remanded for a new penalty trial. Id. at 108a-109a.

The en banc Eleventh Circuit affirmed. On the merits, a six-judge majority believed it "a rational conclusion ... that the jury did not perceive a restriction on the use of any mitigating evidence." App. 10a. Four reasons were given for this conclusion. First, the majority pointed to the use of the

10/ Washington v. Watkins, 655 F.2d 1346, 1367-1378 (5th Cir.), reh. denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982).

word "only" in the instruction to consider "only the following" aggravating circumstances, in contrast to its omission in the instruction to consider "the following" mitigating circumstances. It noted that the same omission in the language of the statute had led this Court in Proffitt, 428 U.S. at 250 n.8, to assume that the statute did not limit the consideration of mitigating circumstances to those listed in the statute. App. 9a. Second, the majority distinguished the instructions in Ford from those condemned in Washington v. Watkins on the ground that the Ford instructions had not included the limiting reference in the Washington instructions to the two "preceding elements of mitigation." App. 9a-10a. Third, since "petitioner was not limited in the introduction of evidence which might be considered mitigating and ... the jury arguments encompassed all evidence introduced in the case," id. at 10a, the majority reasoned that "the jury was not in fact being limited to [sic] what it could consider." Id. Finally, because the trial judge seemed to understand his duty to consider all the mitigating evidence proffered by Mr. Ford, the majority found "[i]t ... reasonable to conclude that the state judge's perception of what could be considered was conveyed to the jury." Id.

Alternatively, the majority held that Mr. Ford had not demonstrated sufficient prejudice to excuse his failure to raise this claim in the Florida courts. Id. (adopting the reasoning in Chief Judge Godbold's opinion, id. at 19a). First finding that petitioner had committed a procedural default under Florida law -- since he "neither objected to the instruction at trial nor raised it on direct appeal," id. at 9a -- the majority then inquired under Wainwright v. Sykes whether petitioner had shown sufficient cause and prejudice to relieve

him of the default. App. 9a-10a and 19a. It passed the issue of "cause," id. at 9a, and concluded that his demonstration of "prejudice" was insufficient because, in its view, it was unlikely that the jury's verdict would have been any different if it had considered the nonstatutory mitigating evidence. App. 10a.

Dissenting from the court's disposition of this claim, Judge Kravitch would have held that Mr. Ford had sufficiently demonstrated cause and prejudice and that, under the principles articulated in Sandstrom v. Montana, 442 U.S. 510 (1979), the the record showed a violation of the eighth amendment requirements of Lockett and Eddings. She noted that the Fifth Circuit had so held in Washington v. Watkins, where the error was indistinguishable. App. 50a-61a.

REASONS FOR GRANTING THE WRIT

- I. THE FLORIDA SUPREME COURT'S SECRET, EX PARTE SOLICITATION, RECEIPT, AND CONSIDERATION OF REPORTS FROM STATE EXECUTIVE AGENCIES CONCERNING CAPITAL LITIGANTS WHOSE APPEALS WERE THEN PENDING FOR SENTENCING REVIEW PRESENT VITAL CONSTITUTIONAL QUESTIONS WHICH SHOULD BE RESOLVED BY THIS COURT

May an appellate court secretly gather and consider extra-record information concerning the appellants and issues before it for review? The question arises from the Florida Supreme Court persistent practice of soliciting from state agencies extra-record information regarding death-sentenced appellants in connection with their pending appeals, without notice to the appellants or their lawyers and without the sanction of any statutory or procedural authority which might have given notice of the practice. By a narrow six-to-five vote, the Eleventh Circuit found this startling practice acceptable. It based that determination on an untenable inference that the Florida Supreme Court deliberately and regularly obtained ex parte

information of a vital nature but then failed to "use" it. This conclusion is belied by even the truncated record that Mr. Ford has been permitted to make. The regular resort to secret evidence in affirming capital sentences demands correction on the most basic of constitutional grounds.

The constitutional questions presented are not unfamiliar to this Court. They were raised in a different setting in a petition for certiorari following the Florida Supreme Court's ruling in Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981). This Court declined to exercise its jurisdiction at that time. Brown v. Wainwright, 454 U.S. 1000 (1981). Whatever considerations led the Court to deny certiorari in Brown, the current posture of this case makes it the final opportunity for any court to resolve these questions in a seemly and intelligible manner before petitioner and numerous other condemned Florida prisoners are put to death. These questions call for review by this Court at this time for several reasons.

First, at the time of the Brown petition, it was still possible that the constitutional grievances presented would be corrected in federal habeas corpus proceedings. Now it is not possible. The en banc ruling of the Eleventh Circuit was expressly intended to preclude and will have the effect of precluding any further consideration of these constitutional issues in this or any other case.

Second, at the time of Brown, the factual record was scanty because of the Florida court's denial of petitioners' request for an evidentiary hearing and its decision solely on the pleadings. Thus, under 28 U.S.C § 2254(d), there was a chance that the record would be developed in federal habeas.

Now there is no chance. The Eleventh Circuit not only affirmed the denial of the evidentiary hearing sought by Ford, but based its rejection of his constitutional contentions on an interpretation of the Florida court's Brown opinion which forecloses a factual hearing in this or any other case.

Third, the Eleventh Circuit's badly divided ruling leaves the question of the propriety of the Florida Supreme Court's secret practice unresolved and virtually unaddressed. The majority view was expressed in two opinions. The plurality opinion by Judge Roney assumed that resort by an appellate court to ex parte materials in reviewing capital sentences would violate Gardner. However, it read the Brown opinion as asserting that the Florida court did not "use" the materials it had solicited. Judge Tjoflat, the decisive sixth vote, concurred specially. He determined that the Florida court had read the materials but that it did not rely on them. App. 29-30a. He then noted that he might have voted differently if Mr. Ford had separately alleged the appearance of impropriety in the Florida Supreme Court's practice, thinking -- incorrectly^{11/} -- that Mr. Ford had not done so. App. 30a. The five dissenting judges

^{11/} The appearance of impropriety was raised throughout the litigation. Mr. Ford has consistently asserted that the very solicitation and receipt of the non-record information by the Florida court violated his due process and eighth amendment rights. Application for Extraordinary Relief and Petition for Writ of Habeas Corpus at 3-5, 8-16 & 13-14; Petition for Writ of Habeas Corpus at 20; Brief for Petitioner-Appellant at 57, 62-64, 68 & 70-73; Supplemental Brief for Petitioner-Appellant on Rehearing En Banc at 7, 14-15, & 18. He has consistently cited Gardner v. Florida, 430 U.S. 349 (1977), which explicitly states that "any decision to impose the death sentence [must] be, and appear to be, based on reason rather than caprice or emotion." Id. at 358 (plurality opinion) (emphasis added). Gardner did not separate justice and the appearance of justice as distinct and independent issues, but viewed them as inseparably yoked. By citing Gardner as applied to facts which inescapably bring both of its connected theories into play, Mr. Ford has properly raised both issues.

took the view either that the Florida court had not been clear whether it had relied on the materials or that the Florida court had admitted using them. App. 17a-18a, 42a-50a, & 69a-71a. Thus, the sharp, five-one-five division of the en banc court merely clouds the fundamental question.

Fourth, the only thing the en banc court did seem to agree on was its unwillingness to accept the legal basis of the Florida Supreme Court's decision in Brown. The Florida court had upheld its challenged practice on the theory that Gardner is inapplicable to appellate review. App. 96a-97a. The plurality opinion below, however, "assume[d] without deciding that the use by the appellate court of the type of nonrecord material alleged here would be unconstitutional." App. 7a. Thus, the prevailing state and federal court opinions upholding the Florida practice stand on radically divergent legal theories. This is unseemly, to say the least, if the appearance and reality of constitutional justice in capital cases are to be preserved.

Fifth, the en banc majority decision cannot withstand analysis. Its major premise is that the Florida court did not "use" the ex parte materials. It arrives at this premise by reading the Brown opinion as holding that the Florida court did not "use" the materials,^{12/} and by treating this "holding" as a finding of fact. But the majority's attempt to extract such a factual finding from the Brown opinion's ambiguous language and faulty legal reasoning is conclusively rebutted by the procedural posture of Brown, the actual holding in Brown, and the record.

12/ In part, the majority's conclusion rested on the premise that state law (as announced in Brown) prohibited the use of such materials and that there is a presumption of regularity in state court proceedings. The systematic, secret, ex parte solicitation and consideration of such materials, however, should be enough to shake that presumption.

1) The procedural posture: The Brown opinion could not have made any factual findings because the procedural posture of Brown permitted only conclusions of law. Brown was filed in the Florida Supreme Court as an original action; there were no findings of lower courts there on review. The Brown petitioners filed a motion for factfinding proceedings before a special master in the event that any of their factual allegations were controverted. This motion was never reached because the factual allegations were not controverted. Brown was decided on the state's motion to dismiss. In that posture, all of the petitioners' factual allegations were assumed to be true; the decision could only be rendered as a matter of law. Thus, no factual issues could conceivably have been resolved. Since the Florida Supreme Court bypassed petitioner's request for a hearing, conceded every factual allegation, and resolved the matter solely as a question of law, the majority's attempt to read into Brown a finding of fact with a presumption of correctness^{13/} is plainly in error.

2) The Brown holding: The Brown opinion itself did not make factual findings but only discussed legal issues. The Florida court accepted petitioners' factual allegations of solicitation, receipt, and consideration of the ex parte materials and ruled as a matter of law that they presented no constitutional violation. It distinguished between the functions of sentence "imposition" and "review," App. 96a, 97a, & 98a, and held that Gardner applies solely to sentence imposition. Since "non-record information we may have seen ... plays no role in capital sentence 'review'...", App. 97a-98a, "[a]s we

13/ See Sumner v. Mata, 449 U.S. 539 (1981), and 28 U.S.C. 2254(d). But see Edwards v. Arizona, 451 U.S. 477, 482-84 (1981) (different treatment for state court finding premised on misapplication of governing constitutional law).

view the case, ... appellate review can never be compromised, in the constitutional sense ..., by the receipt of any quantity of non-record information." App. 98a n. 16. It then concluded that: "Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant ... to our appellate function in capital cases...." Id. (emphasis added). There is simply no basis in the language^{14/} or reasoning^{15/} of the Florida court's opinion for the factual "finding" attributed to it by the majority.

^{14/} In dissent, Chief Judge Godbold noted:

I read the Brown opinion differently [from the majority]. It seems to me that the Florida Supreme Court, adopting the subjunctive mode in its opinion, has not directly stated that it did not actually rely on non-record information.... The disparate views that the judges of this court have expressed about the import of Brown convincingly demonstrate the intractable ambiguity of the Florida Supreme Court's opinion.

App. 18a.

^{15/} In dissent, Judge Johnson clearly explained that the Florida Supreme Court's opinion had nothing to do with the factual question of whether that court had "used" the information that it secretly acquired:

It is important to note that the Florida Supreme Court has never denied considering non-record material of the kind alleged in this case. Instead, the court merely attempted to draw a legal distinction between the statutory "review" process and constitutionally required "super-visory standards." The majority's acceptance of this distinction, in my opinion, is nothing more than the adoption of a legal conclusion expressed by the Florida Supreme Court. Even where the court in Brown stated that "non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel plays no role in capital sentence 'review,'" 392 So.2d at 1332-33, the court was only articulating its statutorily imposed duty. It was not stating its actual practice. For this reason I find it unnecessary to discuss the "presumption of regularity" relied on in part by the majority.

App. 71a. (emphasis added).

3) The record: The Florida Supreme Court's own opinions and practices belie the majority's premise that the Florida court did not "use" the ex parte materials. In reaching its legal conclusion in Brown, the Florida court accepted the allegations regarding the "non-record information we may have seen," App. 97a, its "reading of non-record documents," App. 98a, and "[t]he 'tainted' information we are charged with reviewing." App. 98a n.17. In a subsequent case, it made clear that Brown "held that the allegations of receipt and consideration of such information by appellate judges, even if true, did not establish error...." McCrae v. Wainwright, 422 So.2d 824, 827 (Fla. 1982) (emphasis added). Thus, the Florida court has gone out of its way to enumerate every conceivable constituent of its questionable practice -- receiving, seeing, reading, reviewing, and considering ex parte materials -- and to uphold the practice as constitutionally permissible.

Moreover, the practice itself demonstrates the hollowness of the en banc majority's semantic distinction between "use," on one hand, and "solicit," "receive," "see," "read," "review," and "consider," on the other.

If the court does not use the disputed non-record information in performing its appellate function, why has it systemically sought the information?

Brown v. Wainwright, 454 U.S. 1000, 1001 (1981) (Marshall, J., dissenting from the denial of certiorari). If the Florida court "solicited the material with the thought it should, would or might be used" and then decided "that it should not be so used....," as the en banc majority suggested, App. 8a, then why did it continue to solicit such materials over a period of years? The Florida court's attempted response -- which even the en banc majority viewed as less than "candid," App. 8a --

only compounds the issue. It said that: "The 'tainted' information we are charged with reviewing was ... in every instance obtained to deal with newly articulated procedural standards ..., " specifically identifying Lockett. App. 98a n.17.^{16/} But if that is true, the Florida court must have "used" the materials. And if in fact they were used for capital appellants' benefit, why conceal it? If the materials were never used, or only used to advantage capital appellants, why order the materials purged from the court's files when the practice was discovered?

The six-to-five majority conclusion that the Florida court did not "use" the materials is also belied by actual experience. An oral argument before the Florida Supreme Court makes the point. Seventeen-year-old Paul Magill had been sentenced to death. At oral argument, his counsel urged that a life sentence should have been imposed. She relied, in part, upon psychiatric information presented to the trial court. But she was then questioned by the Chief Justice of the Florida Supreme Court about an inconsistent, extra-record psychological evaluation that the Florida court had secretly obtained from the prison.^{17/} What clearer "use" could there be?

^{16/} In fact, the practice began in 1975, three years before Lockett. See App. 9a.

^{17/} The appendix below contains a motion by Magill's appellate counsel. The motion reveals that during oral argument then-Chief Justice Overton referred to a psychological screening report prepared after Mr. Magill's sentencing and after his incarceration on death row. The report was discussed by the Chief Justice in relation to the presence or absence of mitigating circumstances in the case, an issue that bore directly on whether the death sentence imposed upon Mr. Magill should have been reversed or affirmed. The death sentence was in fact vacated by the Florida Supreme Court because of the trial court's failure to articulate the mitigating circumstances it may have considered. Magill v. State, 386 So.2d 1188 (Fla. 1980). The reimposition of the death sentence was later affirmed. Magill v. State, 428 So.2d 649 (Fla. 1983).

Sixth, the Florida court's own resolution of these questions is no more satisfactory. It was based on the purported distinction between sentence "imposition" and "review." In the Florida court's view, "[n]either of [the court's] sentence review functions ... involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances." App. 96a. As a result, "nonrecord information [the Justices] may have seen, even though never presented to or considered by the [trial] judge, the jury, or counsel, plays no role in capital sentence 'review.'" App. 97a-98a.

This analysis fails for several reasons. To say that non-record information has no proper place in the Florida court's appellate review is not to say that such information cannot affect that court's performance of its function. Manifestly, it can. The Florida Supreme Court undertakes a proportionality review: to "review [each death] case in light of the other decisions and determine whether or not the punishment is too great." Proffitt, 428 U.S. at 251 (quoting State v. Dixon, 283 So.2d 1, 10 (Fla. 1973)). Secret evidence that tends to support, refute, or clarify the nature of the aggravating and mitigating circumstances in the cases being compared--such as prison classification records showing violence or in-prison psychiatric reports purporting to document lack of remorse, future dangerousness, or mitigating psychiatric disorder -- would necessarily affect such a proportionality review. Indeed, the Florida justices would have to be superhuman to ignore such evidence, which they specifically solicited in connection with that review, once they had read and considered it.

Moreover, the Florida Supreme Court's review function is not nearly as circumscribed as the Brown opinion suggested. It had previously described the Florida capital sentencing process

as "trifurcated." See, e.g., Dobbert v. State, 375 So.2d 1069, 1071 (Fla. 1979). Under its prior opinions, its review included "a separate responsibility to determine independently whether the imposition of the penalty is warranted." Songer v. State, 322 So.2d 481, 484 (Fla. 1975) (emphasis added), vacated on other grounds, 430 U.S. 952 (1977). This duty to make an independent determination requires the Florida court to "evaluate anew the aggravating and mitigating circumstances" Harvard v. State, 375 So.2d 833, 834 (Fla. 1977), cert. denied, 441 U.S. 956 (1979). Accord Peek v. State, 395 So.2d 492, 500 (Fla.), cert. denied, 451 U.S. 964 (1981); Vasil v. State, 374 So.2d 465, 471 (Fla. 1979); McCaskill v. State, 344 So.2d 1276, 1280 (Fla. 1977); Adams v. State, 341 So.2d 765 (Fla. 1977); Halliwell v. State, 323 So.2d 557, 561 (Fla. 1975). This Court relied on that duty in upholding the Florida statute in Proffitt. 425 U.S. at 253. The secret consideration of questionable but untested ex parte materials such as in-prison psychiatric reports clearly can affect a reviewing court's determinations of the appropriateness of a capital sentence, whether that determination involves a reweighing of the aggravating and mitigating circumstances or merely an evaluation of the acceptability of the original sentencer's weighing.

Seventh, the issues presented here beg the reasoned examination that only the granting of certiorari now can provide. The abstruse analysis of the en banc majority did not dispose of some borderline or frivolous constitutional claim. It sanctioned a practice fundamentally at war with due process. The gross unfairness of a procedure governing life and death where non-record information is secretly acquired and considered by an appellate court calls into question the traditional foundations of our system.

Whether or not capital defendants are entitled to "a greater degree of reliability" in the process that sends them to their death, Lockett, 438 U.S. at 604; see, e.g., Gardner, 430 U.S. at 364, they are entitled to the protections of due process, to the effective assistance of counsel, to confront the evidence against them, and to be free of cruel and unusual punishment and compulsory self-incrimination. No less than other litigants, they are entitled to an orderly and regular course of judicial proceedings in which evidence is received and tested by the traditional adversary methods of the Anglo-American system of justice. But the Florida Supreme Court practice challenged here is more evocative of the Star Chamber^{18/} than the reasoned, reliable review required by this Court's precedents.

When this practice came to light, despite the Florida court's efforts to keep it secret and to purge its files, petitioner and other similarly situated death row prisoners duly pursued their remedies in both the state and federal courts. In one place, they were told that no findings of fact need be made because the practice was constitutionally acceptable. In the other, they were told that the practice might well be unconstitutional but that findings of fact never made established that it had not really occurred. Nothing could be more unseemly than to have an issue of such magnitude, affecting so many lives and raising such fundamental questions about the operation of the

18/ The Star Chamber, which operated during the reign of the Tudors, was empowered both to proceed solely on rumor and to compel self-incrimination. It was abolished by Act of Parliament in 1641 because of popular revulsion at its practices. The challenged Florida court practice included clandestine consideration of untested psychological reports -- some made by corrections personnel, App. 95a -- based on in-prison evaluations which the death sentenced prisoners had little ability to avoid and which they were not warned would be used against them in their pending capital appeals. See Estelle v. Smith, 451 U.S. 454 (1981).

judicial process, "resolved" with finality by so contradictory a course of proceedings. This Court's judgment on the issue can alone set the matter right.

II. THE COURT SHOULD GRANT THE WRIT TO DETERMINE WHETHER THE EIGHTH AMENDMENT PERMITS THE EXECUTION OF A DEATH SENTENCE BASED IN PART ON IMPROPER AGGRAVATING CIRCUMSTANCES WHEN THE APPELLATE RULE CONDONING THIS RESULT EXPRESSLY DISREGARDS EVIDENCE OF NONSTATUTORY MITIGATING CIRCUMSTANCES

The issue underlying the question presented here is similar to those in both Barclay v. Florida, No. 81-6908, and Zant v. Stephens, No. 81-89: whether a death sentence that rests, in part, upon improper aggravating circumstances may nonetheless be affirmed on review and carried out. The present case, however, adds a dimension to Barclay and Zant that makes it particularly appropriate for consideration by this Court.

Here, the state law premise upon which the Florida Supreme Court affirmed Mr. Ford's death sentence is clearly articulated: the two-pronged rule of Elledge v. State, 346 So.2d 998 (Fla. 1977). The Elledge rule provides that a sentence premised in part on improper aggravating circumstances will be vacated if there are any statutory mitigating circumstances present. This result is dictated by the necessity to "guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Id., 346 So.2d at 1003. But under the second prong of the Elledge rule, the sentence must be affirmed if there are no statutory mitigating circumstances:

It appears that the United States Supreme Court does not fault a death sentence predicated in part upon nonstatutory aggravating factors where there are no mitigating circumstances. The absence of mitigating circumstances becomes important, because, so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is dictated by our statute. Section 921.141(2)(b) and (3)(a), Florida Statutes.

Id. at 1002-1003 (emphasis deleted). The application of this prong of the Elledge rule to Mr. Ford's case was expressly grounded on the absence of the "mitigating circumstances duly enacted by the representatives of our citizenry." App. 91a. The Florida Supreme Court acknowledged that "testimony favorable to appellant's character and prior behavior [had been] presented by the defense in mitigation during the sentencing trial." Id. Such nonstatutory mitigating evidence simply does not count for Elledge purposes.

The very statement of the Elledge rule reveals its constitutional infirmity. If there are nonstatutory mitigating circumstances present, then the consideration of improper aggravating circumstances taints the weighing process just as surely as when statutory mitigating circumstances are in the balance -- upsetting the "informed, focused, guided and objective inquiry" required by innumerable precedents. See, e.g., Proffitt, 428 U.S. at 259; Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980). And insofar as the Elledge rule prevents consideration of nonstatutory mitigating circumstances at the appellate level, it is a plain violation of Lockett and Eddings: The disregard of nonstatutory mitigating circumstances as a matter of law by an appellate court in order to sustain an otherwise improperly imposed death sentence differs not at all from the

disregard of such circumstances in the first instance by the sentencer in order to impose the death sentence. Eddings, 455 U.S. at 113-14.^{19/}

The majority opinion below does not address the question actually presented by this case. It inexplicably accepts without discussion the Florida court's conclusion that there were no mitigating circumstances present. App. 12a (plurality opinion); App. 19a -20a (Godbold, C.J., and Clark, J., concurring). In dissent, only Judge Johnson clearly recognizes that the Florida Supreme Court's disregard of nonstatutory mitigating circumstances violates Lockett and Eddings. App. 73a.^{20/}

Judge Roney's plurality opinion on the Elledge issue is entirely unsatisfactory for another reason. It attempts to distinguish situations in which the consideration of aggravating circumstances is improper because they are unconstitutional or nonstatutory, as in Zant or Henry v. Wainwright,^{21/} from situations in which the consideration is improper because of a

^{19/} A third constitutional infirmity of the Elledge rule need not be reached in this case. Even if there were no mitigating circumstances at all, affirmance under the Elledge rule would be constitutionally impermissible because the appellate court could not determine whether the sentencer would have found the proper aggravating circumstances sufficient to justify a death sentence. Put another way, a general sentence based in part upon proper considerations and in part upon improper ones would have to be vacated under the principles of Stromberg v. California, 283 U.S. 359 (1931), and its progeny. This is the question presented in Zant; an affirmance in Zant would, therefore, require reversal here.

^{20/} The other three judges who dissented with respect to the court's resolution of this issue questioned the Florida Supreme Court's conclusion that there were no mitigating circumstances. They found no need to press the subject, however, because of their view that the matter should have been resolved under the third question raised by the application of the Elledge rule, discussed supra n.19. App. 36a-37a, 65a, and 73a-74a.

^{21/} 661 F.2d 56 (5th Cir. 1981) (Unit B), vacated and remanded, U.S. ___, 102 S.Ct. 2922 (1982), judgment reinstated, 686 F.2d 311 (5th Cir. 1982) (Unit B), cert. pending (No. 82-840).

lack of evidence to establish the circumstances, as in Ford. App. 11a. That distinction must fail. The constitutional infirmity of predicating a death sentence in part upon improper aggravating circumstances is that sentencing discretion is not sufficiently channeled^{22/} when it is channeled in part by considerations that should have played no role. As this Court framed the question presented in Zant, the focus must be on the effect that improper consideration of aggravating circumstances has upon the channeling process, rather than on why consideration was improper. 455 U.S. at 416-17.^{23/}

The plurality's alternative ground -- adopting Chief Judge Godbold's characterization of the Elledge rule as a harmless error rule, App. 12a & 19a-20a -- is equally flawed. First, it fundamentally misunderstands the Elledge rule as employed by the Florida Supreme Court. The Elledge rule does not involve a particularized harmless error analysis to determine on the facts of each case whether an improperly considered aggravating circumstance distorted the weighing process. Rather, it is a categorical rule based on a legal proposition. Under Elledge, the improper consideration of any aggravating circumstances after the consideration of one proper one must be harmless in the absence of statutory mitigating circumstances.

22/ "[I]f a State wishes to authorize capital punishment... [i]t must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.'" Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes omitted).

23/ This analysis fails for another reason: Petitioner did allege consideration of constitutionally improper aggravating circumstances. In his petition for a writ of habeas corpus in the district court and on appeal to the Eleventh Circuit, Mr. Ford claimed that three of the five aggravating circumstances which the Florida Supreme Court determined to have been properly considered should have been set aside as well, because the application of these circumstances to the facts of Mr. Ford's case violated the principle of Godfrey v. Georgia, 446 U.S. 420 (1980).

"[I]n the weighing process which is dictated by our statute," Elledge, 346 So.2d at 1003, the absence of statutory mitigating circumstances leaves nothing to balance against even a single proper aggravating circumstance. Thus, to call this a harmless error rule does not avoid the fact that the legal premise of the Elledge rule violates Lockett.

Second, even if Elledge were a particularized fact-based harmless error rule, its application to this case could not be squared with Chapman v. California, 386 U.S. 18 (1967). Where there are substantial nonstatutory mitigating circumstances -- as the Florida court recognized here, App. 91a -- the improper consideration of three out of eight aggravating circumstances can hardly be considered harmless beyond a reasonable doubt.

Accordingly, certiorari should be granted to determine the constitutional propriety of the application of the Elledge rule to Mr. Ford's case.

III. THE COURT SHOULD GRANT CERTIORARI TO DETERMINE
WHETHER PERMITTING A JURY AND JUDGE TO IMPOSE
THE DEATH SENTENCE WITHOUT ANY GUIDANCE CON-
CERNING THE LEVEL OF CERTAINTY THEY MUST HAVE
IN THE CORRECTNESS OF THE JUDGMENT THAT DEATH
IS APPROPRIATE SATISFIES THE STANDARDS OF
RELIABILITY CONSTITUTIONALLY REQUIRED IN
CAPITAL SENTENCING

It is well settled that the death penalty can be constitutionally imposed only pursuant to procedures that assure "reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Until now, this concern for reliability has focused on the need for guidance respecting the range of factual matters considered by the sentencer. See Furman v. Georgia, 408 U.S. 238 (1972); Gregg v. Georgia, 428 U.S.

153, 195 (1976). In this regard, the Court has assumed that adequate guidance is provided "when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." Proffitt, 428 U.S. at 258.

However, now that the statutes that gave rise to these holdings have been "clarified in concrete cases," Zant, 456 U.S. at 414, a previously unrecognized threat to reliability in capital sentencing has emerged. This threat arises not from the indeterminacy of the factual matters that the sentencer may consider but from the indeterminacy of the "level of subjective certainty," Santosky, 455 U.S. at 769, that the sentencer must reach about the correctness of the several fact-based determinations leading to the ultimate conclusion that death is the appropriate punishment in that particular case. See Woodson, *supra*. Under Florida law, the sentencer must find the existence of some aggravating circumstances and it may or may not find mitigating circumstances. It then must determine whether the aggravating circumstances are "sufficient" to warrant the death penalty. If there are mitigating circumstances, it must determine whether they are outweighed by the aggravating factors. Fla. Stat. § 921.141 (2) and (3). What standard guides the sentencer's exercise of judgment concerning each of these life-or-death determinations?

The area for uncertainty is large. When, for example, a jury considers whether aggravating circumstances are sufficient to warrant the death penalty and whether aggravating circumstances outweigh mitigating circumstances,

[i]t seems . . . entirely possible that a jury might answer both of those questions affirmatively and yet feel that a comparison of the totality of the aggravating factors with the totality of the mitigating factors leaves it in doubt as to the proper penalty.

Smith v. North Carolina, ___ U.S. at ___, 103 S.Ct. 474, 474-475 (1982) (Stevens, J., dissenting from denial of certiorari). In such a case, the death penalty can nevertheless be imposed pursuant to the Florida statute -- "in spite of factors which may call for a less severe penalty," Lockett, 438 U.S. at 605 -- because the jury has no guidance as to the proper manner in which to resolve such doubt. Thus, at the very core of the process, the sentencer is left to its own inherently arbitrary devices.

This risk of unreliability can be minimized only by requiring capital sentencing determinations to be made under a "reasonable doubt" standard. Standards of proof serve "to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision." Addington, 441 U.S. at 423. "Where one party has at stake an interest of transcending value...this margin of error is reduced as to him by the process of placing on the other party the burden...of persuading the factfinder...beyond a reasonable doubt." Speiser v. Randall, 357 U.S. 513, 525-26 (1958). The reasonable doubt standard "impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." In re Winship, 397 U.S. at 364. Given this Court's persistent concern that the decision to impose the death penalty be reliable in proportion to its importance, see, e.g., Woodson, 428 U.S. at 305, the use of the reasonable doubt

standard as a test of "the degree of confidence our society thinks [the sentencer] ... should have in the correctness" of his or her capital sentencing determinations, Addington, 441 U.S. at 423 (quoting Winship, 397 U.S. at 370 (Harlan, J., concurring)), seems particularly appropriate.

The majority opinion below failed to recognize these principles. It held that a reasonable doubt standard is not required because the judgments made in capital sentencing are not factual judgments but involve the weighing of facts. Yet, regardless of how one characterizes the nature of the various determinations made by the capital sentencer, they require "a large measure of judgment." App. 76a n.6 (Anderson, and Clark, JJ., dissenting). The applicability of some standard of certainty to these determinations, as well as the propriety of "reasonable doubt" as the standard, is, as Judge Anderson succinctly observed, "near obvious." App. 78a.

The majority also rejected this conclusion on the ground that it was foreclosed by Proffitt's general endorsement of the Florida statute. App. 15a. But the Court has recently made clear that its approval of a state's capital sentencing statute on its face does not foreclose later challenges to specific procedures, since the Court's earlier "review of the statute did not lead us to examine all of its nuances." Zant, 456 U.S. at 414. Although critical to the administration of the death penalty, the present issue has never been submitted to or addressed by this Court. The Court should, therefore, grant the writ to determine whether the eighth and fourteenth amendments require that, before a determination is made to recommend or impose the death penalty in a specific case, the sentencer must reach a "subjective state of certitude," In re Winship, that death is the appropriate punishment.

IV. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT BETWEEN THE CIRCUITS REGARDING THE PROPER CONSTITUTIONAL ANALYSIS OF CAPITAL SENTENCING INSTRUCTIONS THAT A REASONABLE JUROR COULD UNDERSTAND TO PRECLUDE CONSIDERATION OF NONSTATUTORY MITIGATING FACTORS AND TO DETERMINE THE PROPER APPLICATION OF PROCEDURAL DEFAULT PRINCIPLES TO THIS INSTRUCTIONAL ERROR

The jury instructions at Mr. Ford's capital sentencing trial might well have led a reasonable juror to believe that he or she was permitted to consider only statutory mitigating circumstances, in violation of the Lockett and Eddings requirement that the sentencer must consider all relevant mitigating evidence. The result was to preclude consideration of virtually all of the evidence proffered by Mr. Ford in mitigation, since only a small portion related to statutory mitigating circumstances. The en banc court rejected this Lockett contention on alternative grounds. It held on the merits that, despite the alleged defects in the instructions, "a rational conclusion is that the jury did not perceive a restriction on the use of any mitigating circumstances." App. 10a. Alternatively, the court held that a procedural default in the state courts barred federal review because Mr. Ford failed to demonstrate "prejudice" as required by Wainwright v. Sykes and United States v. Frady, 456 U.S. 152 (1982). Id.

Certiorari should be granted on this issue for several reasons. The en banc court's holding on the merits conflicts with this Court's precedents regarding analysis of jury instructions for constitutional defects, see Sandstrom v. Montana, 442 U.S. 510 (1979); Taylor v. Kentucky, 436 U.S. 478, 489-490 (1978), and with the resolution of precisely the same issue by the United States Court of Appeals for the Fifth Circuit. See Washington v. Watkins, 655 F.2d 1346, 1367-1378 (5th Cir.), reh. denied, 622 F.2d 1116 (5th Cir. 1981), cert. denied, 456

U.S. 949 (1982). The holding on procedural grounds applies the "prejudice" prong of Sykes's "cause" and "prejudice" test in a way that runs afoul of important eight amendment principles.

- A. The en banc court's treatment of the jury instructions conflicts with this Court's precedents regarding analysis of the constitutionality of jury instructions and with the resolution of the same issue by the Fifth Circuit.

Under Sandstrom, proper analysis of the constitutionality of jury instructions "requires careful attention to the words actually spoken to the jury, ... for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Id., 442 U.S. at 514. Judicial interpretation of the law upon which an instruction is premised is not determinative; what counts is "the interpretation which a jury could have given the instruction." Id. at 516-517. In analyzing the jury instructions at issue in this case, the court below purported but failed to follow these principles. In addition, its failure to follow Sandstrom set it in conflict with the Fifth Circuit's decision in Washington v. Watkins.^{24/}

The court below based its ruling on four reasons. First, it stressed the fact that the trial court instructed the jury to "consider the following" statutory mitigating factors but had instructed them to "consider only the following" aggravating factors, a direct paraphrase of the statute. It noted this Court's observation in Proffitt, 428 U.S. at 250

^{24/} Even though the Eleventh Circuit adopted as "binding ... precedent" the decisions of the United States Court of Appeals for the Fifth Circuit "as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date," Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981), and Washington was decided on September 14, 1981, the Eleventh Circuit nonetheless failed to follow Washington in this case. Presumably, this was based on the Eleventh Circuit's position that, as an en banc court, it is free to reject prior Fifth Circuit panel opinions. See Sullivan v. Wainwright, 695 F.2d 1306, 1310 n.7 (11th Cir. 1983); Stein v. Reynolds Securities, 667 F.2d 33, 34 (11th Cir. 1982). Thus, the decision here is in conflict with the Fifth Circuit.

n.8, that the statute does not preclude consideration of non-statutory mitigating factors. Second, it distinguished the Fifth Circuit's decision in Washington on the ground that there the trial court had also directed the jury's attention to two previously enumerated mitigating circumstances. In Ford, however, no parallel instruction was given. Third, it noted that since evidence of nonstatutory mitigating factors was admitted, "the jury was not in fact being limited to [sic] what it could consider." App. 10a. Finally, it noted a passage in the judge's sentencing opinion that found there were no nonstatutory mitigating factors to outweigh those in aggravation. It found it "reasonable to conclude" from the trial judge's correct understanding of the law that his perception was conveyed to the jury. Id.

Nothing about the court's analysis comports with Sandstrom. Its ultimate holding was only that "a rational conclusion" is that the jury did not think it was precluded from considering evidence of nonstatutory mitigating circumstances; it did not find that no reasonable juror could have interpreted the instructions that way. But another and more rational conclusion based on the language of the instruction and the subsequent exchanges between the jury and the court is that the jury did think itself precluded. Certainly, "a reasonable juror could have interpreted the instruction..." that way. Sandstrom, 422 U.S. at 514 (emphasis added). "That reasonable men might derive a meaning from the instructions given other than the proper [and constitutional rule of law] is probable. In death cases doubts such as those presented here should be resolved in favor of the accused." Andres v. United States, 333 U.S. 740, 752 (1948). Thus, there was constitutional error.

Moreover, when one considers the four reasons that led the

court below to its "rational conclusion," it becomes apparent both that the court did not follow Sandstrom and that its conclusion is not rationally supported.^{25/} With regard to the first reason, the Fifth Circuit had previously considered the identical jury charge and convincingly rejected the conclusion later reached by the Eleventh Circuit:

In instructing the jury as to the two aggravating factors that were at issue in the case, the trial court quite properly made it clear to the jury that it could consider only those two aggravating factors, and no others: "Now consider only the following elements of aggravation in determining whether the death penalty should be imposed...." (Emphasis added.) Almost immediately thereafter, in language that almost exactly paralleled that in which the trial court circumscribed the jury's consideration of aggravating factors, the court told the jury to consider the two statutorily prescribed mitigating factors that were at issue in the case: "Now consider the following elements of mitigation in determining whether the death penalty should not be imposed...." (Emphasis added.) Unquestionably, a reasonable juror might well infer from this parallel syntax that the enumerated factors -- both aggravating and mitigating -- were the sole factors that he was permitted to consider in the discharge of his oath....

The State suggests that, to the contrary, the omission of the word "only" from the instruction as to mitigating circumstances would lead a reasonable juror to infer that his consideration of mitigating factors was not limited to those announced by the trial court. Perhaps an extraordinarily attentive juror might rationally have drawn such an inference from the omission of this single word. Indeed, such narrow parsing of language is far from unknown in the related context of judicial interpretation of legislative pronouncements. Nonetheless, at best the State's argument suggests that there is more than one reasonable interpretation of the crucial language in the charge; this does not mean the charge is not constitutionally infirm, for the Supreme Court has held that "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." Sandstrom 442 U.S. at 514, 99 S.Ct. at 2454 (emphasis added).

25/ To be sure, the en banc court's failure to find under Sandstrom that a reasonable juror could have thought himself precluded was premised on its reading of Prady, 456 U.S. at 170, to shift the burden to petitioner to demonstrate that the jury was misled. App. 9a. We show below both that the court misapplied Prady and that the jury was indeed misled.

Washington, 655 F.2d at 1370 (footnotes omitted) (emphasis in original).

Similarly, the court's reliance on this Court's observation in Proffitt is misplaced. Sandstrom makes clear that no matter how persuasive or authoritative a judicial interpretation may be, "it is not the final authority on the interpretation which a jury could have given the instruction." 422 U.S. at 516-17. This Court's observation in Proffitt does not suggest that the language of the instruction -- which tracked the statute -- was clear on its face. Virtually every court in Florida, including the Florida Supreme Court itself, had parsed the same statutory language and made the opposite interpretation. See Cooper v. State, 336 So.2d 1133, 1139 & n.7 (Fla. 1976) (holding that the same language limits consideration to the aggravating and mitigating circumstances listed in the statute). The en banc court's conclusion about how a jury would have understood this instruction is based on a sophisticated judicial parsing of language that no jury could be expected to make^{26/} -- even if it had the text in front of it, which it did not -- and that even the Florida Supreme Court did not achieve.

The second factor relied on by the court below was its purported distinction of Washington on the ground that, in Washington, the trial judge had made a further reference to "the preceding [two enumerated] elements of mitigation." Washington's holding of constitutional error clearly relied primarily upon the portion of the Washington instructions that is identical to those in the present case; its reference to

^{26/} The en banc majority's didactic parsing of the jury instruction in a way that no lay juror could reasonably be expected to duplicate is uncomfortably reminiscent of its reading of the Brown court's subjunctive assumption of the petitioners' factual allegations as a "finding of fact." See Point I, supra.

the "preceding elements" passage was merely corroborative. If corroboration of the effect of the instructions common to the two cases is needed, it is found in Ford in greater measure than in Washington. The original instructions in Ford left the jury uncertain about which mitigating circumstances they were permitted to consider. As a result, the foreman asked the judge during deliberations for additional instruction concerning the permissible aggravating and mitigating circumstances. As noted above: (1) the judge told the foreman that the "list" of factors in the charge constituted "the mitigating and aggravating circumstances" which the jurors were to consider; (2) the foreman repeated to the other jurors that the "list" of factors in the charge constituted "what they [the judge and counsel] consider the aggravating circumstances; what they consider the mitigating circumstances"; and (3) the judge thereupon read the entire offending, syntactically parallel portion of the original instructions to the jury a second time. T. 1351-1356 (emphasis added). Thus, it is obvious that the jury found the original instructions far less clear than did the en banc majority. The judge's subsequent efforts only reinforced the erroneous impression that the statutory mitigating circumstances were exclusive.

The en banc court's third reason was that the jury did hear evidence and argument on the nonstatutory mitigating factors. But the question is not whether the jury heard the evidence, it is whether the jury thought it was permitted to consider it. The sentencers in Lockett and Eddings also heard the nonstatutory mitigating evidence. But, as Washington explains, the "evidence and argument" analysis

completely miss[es] the point of the ... holding in Lockett. Sandra Lockett also introduced evidence of nonstatutory mitigating factors, and also argued

their relevance to the sentencer. The fatal flaw in Lockett was not the exclusion of evidence relating to nonstatutory mitigating factors, but the limitation on the sentencer's consideration of that evidence except as it related to the statutory mitigating factors.

Neither should [the] challenge fail because ... counsel adverted to nonstatutory mitigating circumstances during closing argument. As the Supreme Court has noted in a related context, "arguments of counsel cannot substitute for instructions by the court." Taylor v. Kentucky, 436 U.S. 478, 488-89, 98 S.Ct. 1930, 1936-37, 56 L.Ed.2d 468 (1978).

655 F.2d at 1375.

The en banc court's fourth reason provides even less support for its conclusion. Nothing in the trial judge's sentencing opinion, written after the jury returned its death verdict, could possibly indicate what the jury might or did perceive from the instructions given prior to its deliberations. That the trial judge correctly understood the law has no bearing on what the jury thought if he didn't tell them. The court below did not and cannot point to a single word of the instructions or any of the proceedings in the jury's presence that purportedly conveyed this "perception" to them.

- B. The court of appeals' holding that there was insufficient "prejudice" under Wainwright v. Sykes, 433 U.S. 72 (1977), to excuse a procedural default presents an important question of federal law that has not been, but should be, settled by this Court.

As an alternative ground, the en banc court held that Mr. Ford had not demonstrated sufficient prejudice to excuse his failure to raise the jury instruction claim "at trial [or] ... on direct appeal." App. 9a, 10a and 18a-19a. Having determined that Mr. Ford had committed a procedural default under Florida law,^{27/} the en banc court passed over the question

^{27/} Subsequent to the ruling in Ford, counsel became aware that the Florida Supreme Court does not in fact follow a consistent procedural default rule that can serve as "an independent and adequate state procedural ground that bars the

whether Mr. Ford had shown sufficient cause for his default^{28/} and focused on whether there was sufficient prejudice resulting from the claimed constitutional error to warrant its review on the merits. App. 9a, 10a and 19a. Applying the Court's

27/ continued

federal courts from addressing the issue on habeas corpus." County Court of Ulster County v. Allen, 442 U.S. 140, 148 (1979). In his state post-conviction proceedings in Straight v. Wainwright, 422 So.2d 827 (Fla. 1982), the petitioner raised the same instructional error as that presented here. Compare id. at 831 with App. 101a. Straight's former counsel had committed the same procedural default as Ford's. Compare Straight, 422 So.2d at 829-39 with App. 102a. Yet in Straight, the Florida Supreme Court reached the merits of the claim, 422 So.2d at 831, while in Ford, the court refused to consider the issue because of the prior procedural default. App. 101a.

This inconsistency, it turns out, is by no means rare. Compare Alvord v. State, 396 So.2d 184 (Fla. 1981); Smith v. State, 400 So.2d 956, 958-959 (Fla. 1981); Goode v. State, 403 So.2d 931, 932 (Fla. 1981); Dobbert v. State, 409 So.2d 1053, 1058 (Fla. 1982); Demps v. State, 416 So.2d 808, 809 (Fla. 1982); Songer v. State, 419 So.2d 1044, 1047 (Fla. 1982); Antone v. State, 410 So.2d 157, 163 (Fla. 1982); Thomas v. State, 421 So.2d 160, 162 (Fla. 1982) (court finds procedural defaults) with Douglas v. State, 373 So.2d 895, 896-897 (Fla. 1979); Adams v. State, 380 So.2d 423, 424 (Fla. 1980); Demps v. State, 416 So.2d at 809; Ruffin v. State, 420 So.2d 591, 594 (Fla. 1982); Hall v. State, 420 So.2d 872, 873-74 (Fla. 1982) (court reaches merits despite failure to raise issue on direct appeal).

In effect, Florida's procedural default "rule" is merely a device by which the state court can turn on or off at will its receptivity to constitutional claims. Barr v. City of Columbia, 378 U.S. 146, 149-50 (1964). See also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 458 (1958). The result is that, when they subsequently present their constitutional claims in federal habeas corpus proceedings, some death sentenced petitioners are able to obtain rulings on the merits while others are not. Since the determination of a capital sentencing issue on the merits can mean the difference between life and death, the lightning-like arbitrariness of Florida's procedural default "rule" cannot be sanctioned because it results in the same random cruelty condemned in Furman.

28/ The en banc court did not rule on the "cause" requirement. However, it did note that, prior to Ford's trial in 1974, the Florida courts had consistently ruled that only statutory circumstances could be considered in mitigation. Indeed, the Florida Supreme Court so ruled two years later in Cooper v. State, 336 So.2d at 1139 and n. 7 (1976). Lockett was not decided until 1978, four years after trial. Thus, there was no way counsel could have foreseen this constitutional development and known to raise it at trial.

articulation of the "prejudice" standard in Frady, 456 U.S. at 170, the court reached the conclusion that Mr. Ford's demonstration of prejudice was insufficient.

The nonstatutory mitigating evidence consisted of testimony by Ford's mother and girlfriend about his family life, education, and work history and testimony by a psychiatrist portraying him as a bright young man frustrated by dyslexia. We agree with Chief Judge Godbold that failure to consider this testimony would not create a substantial likelihood that there was actual and substantial disadvantage to the defendant.

App. 10a.

The en banc court's analysis misreads Frady, misapplies this Court's precedents under the eighth amendment regarding the critical importance of consideration of all relevant mitigating evidence, and conflicts with the Fifth Circuit's decision in Washington. It also seriously distorts the nature of the nonstatutory mitigating evidence submitted to the jury in this case.

Under Frady, the petitioner must show "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions," 456 U.S. at 170 (emphasis in original); there must be a "substantial likelihood the erroneous . . . instruction prejudiced [his] chances with the jury." Id. at 174. Plainly, there was such a substantial likelihood here. A fundamental principle of this Court's cases governing capital sentencing is that the sentencer must be permitted to consider all mitigating evidence. This Court has never hesitated to reverse a death sentence if the sentencer's consideration of mitigating circumstances was in any way restricted. Woodson v. North Carolina, 428 U.S. at 303-305; Roberts (Stanislaus) v. Louisiana, 428 U.S. 325, 331-334 (1976); Roberts (Harry) v. Louisiana, 431 U.S. 633, 636-637 (1977); Lockett, 438 U.S. at

607-608; Green v. Georgia, 442 U.S. 95, 97 (1979); Eddings, 455 U.S. at 113-14. Accord Washington, 655 F.2d at 1375. If the instructions in Ford limited the jury to considering only statutory mitigating circumstances -- as we have shown they did -- then Mr. Ford suffered "actual and substantial disadvantage."^{29/} Since the consideration of all mitigating evidence is "constitutionally indispensable," Woodson, 428 U.S. at 304, this disadvantage "so infected the sentencing proceedings as to drain them of fundamental fairness." Washington, 655 F.2d at 1376.

Moreover, in not one of the cases where the Court has reversed because mitigating evidence was excluded from consideration has it considered the strength, substantiality, or persuasiveness of the mitigating evidence that the sentencer was prevented from considering. The only touchstone has been relevance. If relevant mitigating evidence has been excluded from the sentencer's consideration, the death sentence has been reversed.

The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration [footnote omitted] On remand the state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances. We do not weigh the evidence for them.

Eddings, 455 U.S. at 114-15, 117. Accord Washington, 655 F.2d at

29/ The bulk of the mitigating evidence that Mr. Ford proffered was not relevant to any of the statutory mitigating circumstances. See discussion infra at 46. The court below does not suggest that it could have been considered by the jury in connection with any of the enumerated statutory mitigating circumstances.

1375. In contrast to this clear principle -- which recognizes both the intractable nature of the decision to impose death and the inappropriateness of a federal appellate court's substituting itself for the sentencer -- the en banc court has imported a "weighing" test into the analysis of whether a capital defendant was "prejudiced" by the exclusion of some mitigating evidence. This should not stand unreviewed.

Finally, it should be noted that the en banc majority seriously distorted the nature and importance of the mitigating evidence in this case. As summarized by the dissent:

Ford's mother testified that his father had been a belligerent alcoholic during his childhood. She described petitioner's efforts as a boy, to assume paternal responsibilities toward his younger siblings, including working during high school and after graduation to provide financial support for the family. A psychiatrist testified that Ford was bright and an overachiever but that he suffered from a type of brain damage known as Dyslexia, which results in a difficulty working with numbers. The psychiatrist described Ford's generally successful endeavors in his employment, which were subsequently thwarted when a promotion placed him in a position requiring mathematical computations. In the psychiatrist's view, Ford's actions in committing the robbery and murder stemmed from intense depression and frustration related to his disability rather than from a lack of moral standards. The psychiatrist stated that he believed petitioner could be rehabilitated.

App. 58a. Even if a weighing test could be indulged to second-guess the sentencer's decision in matters governing life and death -- a proposition entirely without support in this Court's decisions ^{30/} -- there is no way an appel-

30/ In Frady, the Court did review the evidence to determine whether the verdict would have been different. However, Frady involved a determination of guilt, closely bound by legal rules defining the elements of the offense and the burden of proof demanded for conviction. It did not involve predicting the reaction of a jury to mitigating evidence in the context of the delicate decision to take or spare a human life. See People v. Hines, 390 P.2d 398, 402 (Cal. 1964).

late court can determine what sentence a jury would have rendered had it been permitted to consider the evidence just described. This is particularly true here, where the other side of the equation was unfairly weighted by the improper consideration of at least three of the eight aggravating circumstances. See Point II, supra. If the Court's admonitions regarding reliability in capital sentencing are to have any meaning, the writ should be granted.

CONCLUSION

For the reasons express herein, the petition for a writ of certiorari should be granted.

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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ALVIN BERNARD FORD,
Petitioner,

-v-

CHARLES G. STRICKLAND, JR.,
Warden, Florida State Prison;
LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehab-
ilitation, State of Florida;
JIM SMITH, Attorney General,
State of Florida,

Respondents.

APPENDIX
TO PETITION FOR WRIT OF CERT-
IORARY TO THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

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Alvin Bernard FORD, Petitioner,

v.

Charles G. STRICKLAND, Jr., Warden
Fla. State Prison, Louie L. Wainwright,
Secretary, Department of Offender Re-
habilitation, State of Fla., Jim Smith,
Attorney General, State of Florida, Re-
spondents.

No. 81-6200.

United States Court of Appeals,
Eleventh Circuit.

Jan. 7, 1983.

Death row inmate sought federal habeas relief. The United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., denied relief, and inmate appealed. The Court of Appeals held that: (1) Florida Supreme Court decision denying habeas corpus relief to class of death row inmates, of which petitioner was member, on direct petition for writ of habeas corpus alleging unconstitutional receipt of nonrecord materials during pendency of appeals was dispositive of inmate's claim that nonrecord materials were used and that such practice violated constitution; (2) failure, if any, to consider nonstatutory mitigating testimony did not create substantial

likelihood of actual prejudice; (3) application of harmless error rule in refusing to order resentencing when three of eight aggravating circumstances for imposition of death penalty were found inapplicable on appeal was constitutionally permissible; (4) failure to raise confession issue on direct appeal waived consideration on habeas corpus petition; (5) statutory requirement for imposition of death penalty that aggravating circumstances outweigh mitigating circumstances was not element of crime of capital murder; (6) appellate review of inmate's death sentence was not arbitrary, capricious or in disaccord with constitutional principles; and (7) inmate had failed to carry burden of proving ineffective assistance of counsel at sentencing.

Affirmed and remanded.

Opinion, 676 F.2d 434, vacated.

Roney, Circuit Judge, filed separate opinion in which James C. Hill, Fay, Vance and Albert J. Henderson, Circuit Judges, joined.

Godbold, Chief Judge, dissented in part and specially concurred in part and filed opinion in which Clark, Circuit Judge, joined except as to concurrence in Part V of majority opinion.

Tjoflat and Kravitch, Circuit Judges, concurred in part and dissented in part and filed opinions.

Johnson, Circuit Judge, concurred in part and dissented in part and filed opinion.

R. Lanier Anderson, III, Circuit Judge, concurred in part and dissented in part and filed opinion in which Clark, Circuit Judge, concurred as to Section B.

I. Habeas Corpus — 113(10)

Considering death row inmate's request, after full briefing, extended oral argument, and several months of deliberation on habeas corpus petition, that all appellate proceedings cease and that state judgment be carried out as motion to dismiss appeal, motion was untimely. F.R.A.P. Rule 42(b), 28 U.S.C.A.

2. Habeas Corpus — 117(1)

Where petitioning death row inmate was member of class of death row inmates previously denied relief on direct petition for writ of habeas corpus alleging unconstitutional receipt of nonrecord materials concerning them during pendency of appeals of their capital cases, such decision, which held that state law did not permit use of such nonrecord material in appellate review of a capital sentence and that nonrecord material was not used in contravention of state law, was dispositive of inmate's entitlement to habeas corpus relief on individual petition claiming *ex parte* review of psychiatric evaluations or contact notes, psychological screening reports, postsentencing investigation reports and state prison classification and admission summaries in review of his sentence and that such practice violated constitution. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 5, 6, 14.

3. Habeas Corpus — 85.5(15)

Death row inmate, who alleged that instructions on mitigating circumstances precluded consideration of nonstatutory mitigating factors, had failed to carry burden on petition for habeas corpus of establishing that jury perceived that in deciding whether to recommend life or death it was denied use of nonstatutory mitigating factors where trial court read statute as written, which had previously been recognized not to limit jury's consideration of mitigating circumstances to those listed in statute, introduction of evidence which might be considered mitigating was not limited, and jury arguments encompassed all evidence introduced. 28 U.S.C.A. § 2254.

4. Habeas Corpus — 30(1)

Failure to consider testimony by defendant's mother and girl friend about his family life, education, and work history and testimony by psychiatrist portraying defendant as bright young man frustrated by dyslexia would not create substantial likelihood that there was actual and substantial disadvantage to defendant, and therefore defendant, who admitted that issue was not raised either at trial or on direct appeal, had failed to show that instructions on miti-

gating circumstances, which allegedly improperly precluded consideration of nonstatutory mitigating factors, prejudiced him with jury as required to decide adequacy of instructions on petition for habeas corpus. 28 U.S.C.A. § 2254.

5. Habeas Corpus — 45.2(2)

Application of harmless error rule by Florida Supreme Court in refusing to order resentencing when three of eight aggravating circumstances in support of death sentence, two of which lacked evidentiary support and one of which was based on same aspect of crime as another circumstance, were ruled inapplicable was constitutionally permissible where no mitigating circumstance was found and five of statutory aggravating circumstances relied upon by sentencing judge were upheld.

6. Criminal Law — 641.13(6)

Reasonably effective assistance of counsel was rendered in defense attorney's attempt to win suppression of defendant's oral confession. U.S.C.A. Const.Amend. 6.

7. Criminal Law — 1166.11

Even if attorney's representation in attempting to win suppression of defendant's oral statement to police had fallen short of dictates of Sixth and Fourteenth Amendments, defendant was not prejudiced by any action or inaction of his attorney where statement admitted only presence and participation in robbery and denied participation in shooting, and there was abundant evidence, apart from confession, to place defendant at scene as participant. U.S.C.A. Const.Amend. 6, 14.

8. Criminal Law — 998(3)

Under Florida law, criminal defendant's failure to raise issue which could be asserted on direct appeal precludes consideration of issue on motion for postconviction relief. West's F.S.A. Rules Crim.Proc., Rule 3.850.

9. Habeas Corpus — 45.3(1)

State prisoner can forego opportunity to raise constitutional issues in habeas corpus proceedings by deliberately bypassing

state appellate procedural rules or by merely failing to follow them without showing both cause for default and prejudice resulting from it. 28 U.S.C.A. § 2254.

10. Habeas Corpus ⇨ 25.1(1)

For purpose of Sykes, i.e., that absent showing of both cause for noncompliance and actual prejudice habeas corpus relief is barred because of procedural default in state proceeding, "cause" is defined in light of determination to avoid miscarriage of justice, while "prejudice" means actual prejudice. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

11. Habeas Corpus ⇨ 25.1(8)

Death row inmate's failure to raise oral confession issue on direct appeal waived consideration on habeas corpus petition where claim was perceived and asserted in trial court, accuracy of the statement was not contested, and, in light of abundant evidence apart from confession to place defendant at scene, inmate was not prejudiced by admission. 28 U.S.C.A. § 2254.

12. Homicide ⇨ 7

Florida statutory requirement, for imposition of death penalty, that aggravating factors outweigh mitigating factors was not an element of crime of capital murder under Florida law. West's F.S.A. § 921.141(1), (3)(b).

13. Criminal Law ⇨ 749

Process of weighing aggravating and mitigating circumstances in sentencing is matter for judge and jury and not susceptible to proof by either party. West's F.S.A. § 921.141(1), (3)(b).

14. Habeas Corpus ⇨ 113(9, 11)

Where claim of unconstitutionality of death sentence for failure to require proof of existence of aggravating circumstances beyond reasonable doubt was never specifically briefed or raised before panel, it was not properly before Court of Appeals en banc on rehearing of death row inmate's petition for habeas corpus. West's F.S.A. § 921.141(1), (3)(b); 28 U.S.C.A. § 2254.

15. Homicide ⇨ 354

Under Florida law, existence of aggravating circumstances, for imposition of death penalty, must be proved beyond reasonable doubt. West's F.S.A. § 921.141(1), (3)(b).

16. Habeas Corpus ⇨ 92(1)

Where in a capital punishment case state courts have acted through a properly drawn statute with appropriate standards to guide discretion, federal courts will not undertake case-by-case comparison of facts in given case with decisions of state Supreme Court, even though, were aggravating and mitigating circumstances to be retried, results different from those reached in state courts might be reached.

17. Courts ⇨ 91(1)

Supreme Court of Florida was ultimate authority on Florida law, and Court of Appeals did not sit, on Florida inmate's petition for habeas corpus, to question Florida Supreme Court's interpretation of Florida statutes. 28 U.S.C.A. § 2254.

18. Habeas Corpus ⇨ 45.1(4)

Review by Florida Supreme Court of death row inmate's death sentence was not arbitrary, capricious or in discord with constitutional principles relating to sentencing in capital cases.

19. Habeas Corpus ⇨ 113(12)

Under habeas corpus statute, Court of Appeals presumes correct the facts properly found by state courts. 28 U.S.C.A. § 2254(d).

20. Habeas Corpus ⇨ 92(1)

In reviewing ineffective assistance of counsel claims, federal habeas court does not sit to second-guess considered professional judgments with benefit of 20/20 hindsight. 28 U.S.C.A. § 2254; U.S.C.A. Const.Amend. 6.

21. Criminal Law ⇨ 641.13(1)

Even where attorney's strategy may appear wrong in retrospect, finding of constitutionally ineffective representation is not automatically mandated. U.S.C.A. Const.Amend. 6.

22. Criminal Law — 641.13(2)

That counsel for criminal defendant has not pursued every conceivable line of inquiry in case does not constitute ineffective assistance of counsel. U.S.C.A. Const. Amend. 6.

23. Habeas Corpus — 85.5(11)

Record revealed that death row inmate, who alleged that attorney failed to focus trial judge's and jury's attention on critical factors relevant to sentence determination, received constitutionally adequate representation and no prejudice resulted to him by any action or inaction of counsel, and therefore inmate had not carried burden on petition for habeas corpus of proving ineffective assistance of counsel. 28 U.S.C.A. § 2254; U.S.C.A. Const. Amend. 6.

Richard H. Burr, III, West Palm Beach, Fla., Marvin E. Frankel, New York City, for petitioner.

Joy B. Shearer, Asst. Atty. Gen., West Palm Beach, Fla., Charles Corcoran, Jr., Asst. Atty. Gen., Tampa, Fla., for respondents.

Appeal from the United States District Court for the Southern District of Florida.

Before GODBOLD, Chief Judge, ROONEY, TJOFLAT, HILL, FAY, VANCE, KRAVITCH, JOHNSON, HENDERSON, ANDERSON and CLARK, Circuit Judges.*

PER CURIAM:

This cause, after a decision by a panel, 11th Cir., 676 F.2d 434, was taken en banc for the purpose of resolving for this Circuit several important issues that repeatedly arise in capital cases. After full briefing, extended oral argument, and several months of deliberation during which the judges of the Court sought to resolve and reconcile the various issues involved, a communication was received purporting to be a request by defendant Ford that all appellate proceedings cease and that the state judgment be carried out.

* Judge Joseph W. Hatchett was disqualified because of his participation in the case while a

[1] The Court determines that, considering Ford's communication as a motion to dismiss his appeal, the motion is untimely. Fed.R.App.P. 42(b).

The United States Supreme Court has accepted certiorari of *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), cert. granted, — U.S. —, 103 S.Ct. 340, 74 L.Ed.2d — (1982) which may involve an issue in this case. Although this Court affirms the denial of habeas corpus relief on all grounds, we remand the case to the district court to consider the effect that *Barclay* may have on the denial of habeas corpus relief in this case, and the procedure that should be followed in the district court while the *Barclay* case is pending in the Supreme Court. If a stay of execution is requested pending consideration of the *Barclay* issue, the district court shall entertain such request.

The court *sua sponte* stays issuance of the mandate to and including March 1, 1983, to permit the filing of a petition for writ of certiorari to the United States Supreme Court, if either party wishes to do so, the stay to continue in force until the final disposition of this case by the Supreme Court, provided that within the period above mentioned there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that the certiorari petition has been filed. The Clerk shall issue the mandate on the filing of a copy of an order of the Supreme Court denying the writ, or on the expiration of the stay granted herein, unless the above mentioned certificate shall be filed with the Clerk of this Court within that time. The mandate will affirm the judgment of the district court but remand the case for further proceedings consistent with this opinion.

Since various judges comprise the majority for affirmance on the separate issues decided by this Court, we set forth the following table for easier consideration of the following opinions:

Justice of the Supreme Court of Florida.

ISSUE I: *The Brown Issue*

Affirm: Roney, Tjoflat (by separate opinion), Hill, Fay, Vance and Henderson.

Dissent: Godbold, Kravitch, Johnson, Anderson and Clark.

ISSUE II: *Instructions on Mitigating Circumstances*

Affirm: Godbold (by separate opinion, with which Clark concurs), Roney, Tjoflat (by separate opinion), Hill, Fay, Vance, Johnson, Henderson and Anderson.

Dissent: Kravitch.

ISSUE III: *Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances*

Affirm: Godbold (by separate opinion, with which Clark concurs), Roney, Hill, Fay, Vance and Henderson.

Dissent: Kravitch and Johnson.

Tjoflat and Anderson would certify a question of state law to the Florida Supreme Court before ruling on this issue.

ISSUE IV: *Admission of Ford's Oral Confession*

Affirm: The Court is unanimous to affirm on this issue.

ISSUE V: *Standard by Which Aggravating Circumstances Must Outweigh Mitigating Factors*

Affirm: Godbold, Roney, Tjoflat (by separate opinion), Hill, Fay, Vance, Kravitch (by separate opinion), Johnson and Henderson.

Dissent: Anderson and Clark.

ISSUE VI: *Florida Supreme Court's Standard of Review*

Affirm: The Court is unanimous to affirm on this issue.

ISSUE VII: *Assistance of Counsel at Sentencing*

1. The petition for writ of habeas corpus alleged essentially seven contentions: (1) improper admission of an oral confession; (2) failure of the Florida Supreme Court to require resentencing when it found three of the statutory aggravating circumstances unsupported by the evidence; (3) improper state trial court instructions on mitigating circumstances; (4) failure of the Florida death law to require a finding

Affirm: The Court is unanimous to affirm on this issue.

AFFIRMED AND REMANDED.

RONEY, Circuit Judge, with whom JAMES C. HILL, FAY, VANCE and ALBERT J. HENDERSON, Circuit Judges, join, and other judges join in part as shown by their separate opinions:

Alvin Bernard Ford, convicted in Florida of murdering a Fort Lauderdale policeman, petitioned the federal district court for a writ of habeas corpus pursuant to 28 U.S.C.A. § 2254. A panel of this Court affirmed the district court's denial of relief, rejecting all seven grounds raised by petitioner on appeal. *Ford v. Strickland*, 676 F.2d 434 (11th Cir.1982).¹ A rehearing en banc was granted to examine several important recurring issues in habeas corpus petitions filed by Florida death row inmates. We now affirm the denial of habeas corpus relief but remand the case to the district court for further proceedings as set forth in the per curiam opinion of the Court.

Briefly, the facts which gave rise to petitioner's conviction and sentence are as follows. On the morning of July 21, 1974, Ford and three accomplices entered a Red Lobster Restaurant in Fort Lauderdale, Florida, to commit an armed robbery. During the course of the robbery, two people escaped from the restaurant. Fearing police would soon arrive, petitioner's accomplices fled. Ford remained to complete the theft of approximately \$7,000 from the restaurant's vault.

Officer Dimitri Walter Ilyankoff arrived on the scene. Petitioner allegedly shot him twice in the abdomen and, apparently realizing his accomplices had abandoned him,

that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt; (5) failure of the Florida Supreme Court to apply a consistent standard of reviewing the aggravating and mitigating circumstances in the case; (6) ineffective assistance of counsel at sentencing; and (7) review by the Florida Supreme Court of nonrecord materials in death cases, the so-called *Brown* issue.

ran to the parked police car. Because there were no keys in the car, Ford ran back to the struggling, wounded officer. Petitioner asked Officer Ilyankoff for the keys and then allegedly shot him in the back of the head at close range. Ford took the keys and made a high speed escape.

Petitioner was convicted in Circuit Court, Broward County, Florida, of first degree murder. In accordance with the jury's recommendation, the trial judge sentenced him to death. On direct appeal both the conviction and sentence were affirmed. *Ford v. State*, 374 So.2d 496 (Fla.1979). The United States Supreme Court denied Ford's petition for writ of certiorari. *Ford v. Florida*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner thereafter joined with 122 other death row inmates in filing an application for extraordinary relief and petition for writ of habeas corpus in the Florida Supreme Court. The petitioners challenged the court's alleged practice of receiving nonrecord information in connection with review of capital cases. The Florida Supreme Court denied the petition, *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981), and the United States Supreme Court denied certiorari, *Brown v. Wainwright*, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

Ford then filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and applied for a stay of execution. Relief was denied. *Ford v. State*, 407 So.2d 907 (Fla. 1981).

Finally, petitioner filed a petition for writ of habeas corpus under 28 U.S.C.A. § 2254 in the United States District Court for the Southern District of Florida. The district court denied relief, and the panel affirmed. *Ford v. Strickland*, 676 F.2d 434 (11th Cir. 1982). We granted en banc consideration which vacates the panel's opinion.

I.

The Brown Issue: Nonrecord Material Before The Florida Supreme Court

In *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct.

542, 70 L.Ed.2d 407 (1981), the Florida Supreme Court with a full opinion denied Ford and 122 other Florida death row inmates class relief on a direct petition for writ of habeas corpus alleging the Supreme Court of Florida had unconstitutionally received nonrecord materials concerning death row inmates during the pendency of the appeals of capital cases.

Ford asserts that same issue here, specifically claiming that in his case the Florida Supreme Court reviewed *ex parte* psychiatric evaluations or contact notes, psychological screening reports, post-sentence investigation reports and state prison classification and admission summaries. This practice, he contends, violated the Constitution because it precluded adversarial testing of the information in violation of his rights to due process of law, effective assistance of counsel, confrontation, and reliability and proportionality of capital sentencing. He argues the court's receipt of results of psychiatric examinations which were conducted without first informing him of his Fifth Amendment rights violated his privilege against self-incrimination and his right to confer with his attorney before determining whether to submit to them.

The crux of Ford's assertion is that somehow the nonrecord materials were used in connection with the review of his sentence. The use of such materials would, it is argued, run afoul of the principles of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which held that a death sentence may not be imposed to any extent on nonrecord, unchallengeable information. A collateral argument would fault the use of such materials in other capital cases, even if not used in Ford's case, on the ground that such use in any case would upset the proportionality requirement that every case be considered on review in relationship to all other death cases. See *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976); *State v. Dixon*, 282 So.2d 1, 10 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 296 (1974).

For the determination of this issue, we assume without deciding a point of law and

a point of fact. As to the law we assume without deciding that the use by the appellate court of the type of nonrecord material alleged here would be unconstitutional. The judges who join this opinion have mixed tendencies as to the correct law on this point.² In order to decide this case, however, we find it unnecessary as judges or as a court to determine the law in this regard.³

As to a point of fact, we assume without deciding the Florida Supreme Court received such information, and that it was available to the members of the court. The court itself assumed as much in its consideration of the allegations in *Brown v. Wainwright*, 392 So.2d at 1331 ("Even if petitioners' most serious charges were accepted as true . . ."). Such assumption by us eliminates the necessity for any kind of an evidentiary hearing or other fact-determining inquiry of the Florida court to determine the truth of the allegations.

With these assumptions, the inquiry from a constitutional standpoint is *first*, whether state law permits the use of such materials; *second*, if not, was the material nevertheless used in contravention of state law; and *third*, if not intentionally used in the review of capital cases, did the reading of such information somehow affect the judgment of the members of the Florida Supreme Court so that a federal court should treat the case as if the information had in fact been used. Only if one of these three questions is answered in the affirmative, would we be faced with the question of whether the Constitution was violated.

[2] Does Florida state law permit the use of such nonrecord material in the re-

view of Ford's sentence, or any other capital sentence? The ultimate source of any state's law is found in the decisions of its highest court. See *Tennon v. Ricketta*, 574 F.2d 1243 (5th Cir.1978), cert. denied, 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 57 (1979).³ There are times when a state's supreme court has not yet decided a point of law so that the decisions of lower courts, statutes and other sources must suffice. There are other times when decisions by the state's court of last resort, not being clearly on point, must themselves be interpreted for a federal court to determine what the state court would decide on the precise point. The task is easy here because the Supreme Court of Florida has decided the "case on all fours" with this one in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 71 L.Ed.2d 407 (1981). In *Brown*, the court held that state law does not permit the use of such nonrecord material in the appellate review of a capital sentence.

[A]s a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence.

392 So.2d at 1331.

The record of each proceeding, and precedent, necessarily frame our determinations in sentence review. . . . Factors or information outside the record play no part in our sentence review role.

Id. at 1332.

For a federal court, regardless of the reasons relied on and whether the law an-

phase under Fifth and Sixth Amendments). See *Brown v. Wainwright*, 454 U.S. 1000, 1001, 102 S.Ct. 542, 543, 70 L.Ed.2d 407, 408 (1981) (J. Marshall, dissenting.) To some extent the decision turns on whether the Florida Supreme Court is "imposing" sentence or doing something qualitatively different. See *Brown v. Wainwright*, 392 So.2d at 1331.

3. The Eleventh Circuit, in the en banc decision of *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981), adopted as precedent the decisions of the former Fifth Circuit decided prior to October 1, 1981.

2. At least three bases of unconstitutionality are asserted: first, the practice would be inconsistent with the United States Supreme Court's past insistence on strict procedural regularity in the imposition and review of capital sentences; second, much of the alleged information may be inadmissible and unreliable hearsay, which petitioners should have the opportunity to cross-examine; and third, some of the material may be inadmissible under *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (psychiatrist's testimony concerning court ordered examination for competency to stand trial inadmissible at capital sentencing

nounced is good or bad law, the decision by the Florida court concludes the point.

Was the material used in contravention of state law? The federal court must be content with the answer that it was not so used for these reasons. First, there is a presumption of regularity in state proceedings, which would seem to rise to its highest level in considering the work of the highest court of the state. See 28 U.S.C.A. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981). We presume the state supreme court follows its own law and procedures. Second, Ford was a class petitioner for writ of habeas corpus to the Florida Supreme Court in *Brown*, where the court effectively stated that non-record material was not used in the review of petitioners' cases.⁴ Third, there has been no specific allegation that Ford's case was treated differently from all others. See *Ford v. Strickland*, 676 F.2d at 444. Fourth, it is obnoxious both to the traditional role and procedures of the appellate process and to current notions of comity and federalism to suggest that a state appellate judge should be required to respond in a federal court to questions concerning what was or was not considered by him in the review of a state case. Petitioner virtually admits his argument would eventually carry that far if all else failed in obtaining the proof of what he asserts. Any principle that supports the start of that journey would support a conclusion which is not now a part of American law.

Would reading the nonrecord material so affect the Florida judges that the federal court should, for constitutional review purposes, treat the case as if the information had been used by them? The Florida court has given the answer to that question in the *Brown* decision.

A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned appellate functions. Plainly, it would

not. Just as trial judges are aware of matters they do not consider in sentencing, *Alford v. State*, 355 So.2d 108 (Fla.), cert. denied, 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978), so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks.

Id. at 1333. That judges are capable of disregarding that which should be disregarded is a well accepted precept in our judicial system. *Harris v. Rivera*, 454 U.S. 339, 345, 102 S.Ct. 460, 464, 70 L.Ed.2d 530, 556 (1981).

The Florida Supreme Court has left unanswered the perplexing question asked in Justice Marshall's dissent to the denial of certiorari in the *Brown* case, 454 U.S. 1000, 1001, 102 S.Ct. 542, 543, 70 L.Ed.2d 407, 408, to-wit:

If the court does not use the disputed non-record information in performing its appellate function, why has it systematically sought the information?

A candid answer would have been better than the veiled suggestion in footnote 17 of the *Brown* opinion, 392 So.2d at 1333. ("The 'tainted' information we are charged with reviewing was, as counsel concedes, in every instance obtained to deal with newly-articulated procedural standards.") But even if members of the court solicited the material with the thought it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it was not used, and the rejection of the notion that it affected the judgment of the reviewing judges of the court ends the matter when addressed at the constitutional level.

II.

Instructions on Mitigating Circumstances

Instructing the jury on aggravating circumstances, the trial judge stated, "[y]ou

4. It is worth noting here that the members of the court who reviewed Ford's sentence on direct appeal, Justices England, Adkins, Boyd, Overton, Sundberg, and Hatchett, *Ford v.*

State, 374 So.2d 496 (Fla.1979), were, but for one, all members of the court which considered the petition for writ of habeas corpus. *Brown v. Wainwright*, 392 So.2d at 1334.

shall consider only the following . . ." and read the statutory language. With regard to mitigating circumstances, he said, "[y]ou shall consider the following . . ." omitting the word "only" and again reading the appropriate statutory language. Ford neither objected to the instruction at trial nor raised it on direct appeal.

Relying primarily on *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981), *cert. denied*, — U.S. —, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), petitioner argues the above instructions limited the jury's consideration to statutory mitigating factors, precluding consideration of nonstatutory mitigating factors contrary to *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* held "the sentence . . . [must] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604, 98 S.Ct. at 2964.

Petitioner concedes procedural default on this issue, admitting that it was raised neither at trial nor on direct appeal. The panel noted the fact that "Ford neither objected to the instruction at trial nor raised it on appeal," but did not decide whether the objection had been waived. 676 F.2d at 440.

The proper inquiry as to waiver of the objection should be whether Ford comes within the cause and prejudice exception to *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Ford contends he cannot be faulted for failing to raise the issue, arguing the grounds for objecting were unknown at trial because Florida Supreme Court decisions decided prior to trial indicated only statutory mitigating circumstances could be considered. The court ruled explicitly to this effect two years after trial in *Cooper v. State*, 336 So.2d 1123, 1139 & n. 7 (Fla.1976), *cert. denied*, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), a direct reversal of this view, was not decided until

two years later (four years after trial) and hence was unavailable as a basis for objection. In light of our determination that Ford has not met the prejudice prong of *Sykes*, we need not determine whether the cause prong has been met. See *United States v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1594, 71 L.Ed.2d 816 (1982).

The *Sykes* issue becomes blurred in this case, however, because of two principles which mesh to deny Ford relief on this point. First, the Supreme Court has held that an erroneous jury instruction satisfies *Sykes'* prejudice prong only if actual, not possible, prejudice is shown so that there is "actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982).

Second, in evaluating a trial court's instructions, we must determine the interpretation a reasonable juror might give the words of the instruction in question. *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). The entire charge must be examined as a whole to discern whether the issues and law presented to the jury were adequate. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir.1980), *cert. denied*, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409 (1981).

[3] The fundamental issue then is whether Ford has carried his burden in establishing that his jury perceived that in deciding whether to recommend life or death, it was denied the use of any nonstatutory mitigating factors. We think not for the following reasons. First, the trial court read the statute as written, setting forth the entire list of statutory mitigating circumstances, which statute omits the word "only." The Supreme Court has recognized the Florida statute does not limit a jury's consideration of mitigating circumstances to those listed in the statute. *Proffitt v. Florida*, 428 U.S. at 250 n. 8, 96 S.Ct. at 2965 n. 8.

Second, the instruction here was different from *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981), *cert. denied*, — U.S.

—, 102 S.Ct. 2021, 72 L.Ed.2d 474 (1982), where the state trial judge concluded the charge with these words:

If you unanimously find from the testimony that one or more of the preceding elements of mitigation exist(s), then you must consider whether it outweighs the aggravating circumstances you previously found and you must return one of the following verdicts . . .

Id. at 1368 (emphasis added). Here the jury was not confined to two "preceding elements of mitigation," as in *Washington*.

Third, that petitioner was not limited in the introduction of evidence which might be considered mitigating and that the jury arguments encompassed all evidence introduced in the case explains counsel's perception that the jury was not denied the use of any evidence in weighing sentences. Thus had petitioner known of *Lockett*, he would still have no reason to object because the jury was not in fact being limited to what it could consider.

Fourth, the sentencing judge's order stated: "There are no mitigating circumstances existing—either statutory or otherwise—which outweigh any aggravating circumstances." This order reflects the trial judge's perception that there was no restriction against the use of any nonstatutory mitigating evidence offered by Ford. It is reasonable to conclude that the state judge's perception of what could be considered was conveyed to the jury.

Under these circumstances, a rational conclusion is that the jury did not perceive a restriction on the use of any mitigating evidence.

[4] As an alternative ground we have no problem in concurring with Chief Judge Godbold's assessment of lack of prejudice. The nonstatutory mitigating evidence consisted of testimony by Ford's mother and girlfriend about his family life, education, and work history and testimony by a psychiatrist portraying him as a bright young man frustrated by dyslexia. We agree with Chief Judge Godbold that failure to consider this testimony would not create a substantial likelihood that there was actual and substantial disadvantage to the defendant.

III.

Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances

After receiving instructions on all eight aggravating circumstances provided in Fla. Stat. § 921.141, Ford's jury recommended the death penalty. The jury gave a general verdict without an indication as to what factors it thought were supported by the evidence or controlling in its deliberations. The state trial judge then recited evidentiary support for all eight statutory aggravating circumstances and sentenced petitioner to death. On direct appeal the Florida Supreme Court ruled three of the eight did not apply because two lacked evidentiary support and one was based on the same aspect of the crime as another circumstance. *Ford v. State*, 374 So.2d at 501-03. Upholding the other five aggravating circumstances, the Supreme Court specifically found the killing "especially heinous, atrocious, or cruel." *Id.* at 503. In the absence of any mitigating circumstances, death was presumed the appropriate penalty and the sentence was affirmed. *Id.*

Petitioner argues that resentencing under the above circumstances is required under *Henry v. Wainwright*, 661 F.2d 56 (5th Cir. 1981), vacated and remanded on other grounds, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326, judgment reinstated, 686 F.2d 311 (5th Cir.1982), and *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir.1981), *certified to the Supreme Court of Georgia*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982).

In *Stephens* the Georgia Supreme Court had ruled that one of the statutory aggravating circumstances presented to the jury was unconstitutionally vague. We held that the death sentence must be set aside because it was impossible to tell from the record the extent to which the Georgia jury had relied on an unconstitutional statutory aggravating factor in imposing the death

penalty. *Stephens v. Zant*, 631 F.2d at 406. The United States Supreme Court has now certified to the Georgia Supreme Court the question of what state law premises support the conclusion that the death sentence should stand in the face of the jury's finding an invalid statutory aggravating circumstance. *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982). The Supreme Court thus indicated that the state law rationale of a rule like Florida's, under which a death penalty can be upheld even in the face of some difficulty with the precise grounds relied on by the sentencer, is important to the constitutional decision. In *Henry*, which was adhered to by the panel, 686 F.2d 311 (5th Cir.1982), after vacation and remand by the United States Supreme Court to consider a state procedural default, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), we held the trial court committed constitutional error in admitting into evidence and permitting the jury to consider evidence of nonstatutory aggravating circumstances. *Henry v. Wainwright*, 661 F.2d at 60.

While the precise impact of the Supreme Court's recent actions in *Stephens* cannot be known at this juncture, the Court's ruling gives no direct support to Ford's position in this case. Indeed, *Stephens* leaves open the possibility that when there are proper state law premises, a death sentence may be sustained by a reviewing court so long as at least one of a plurality of statutory aggravating circumstances is valid and supported by the evidence. *Williams v. Maggio*, 679 F.2d 381, 386-90 (5th Cir.1982) (en banc) (upholding death sentence where Louisiana Supreme Court reviewed only one of three aggravating circumstances).⁵

In any event, we think that *Stephens* and *Henry* are inapposite to the case at bar. This case involves consideration of neither unconstitutional nor nonstatutory aggravating evidence. That the evidence was insufficient to support two circumstances and one circumstance was based on the

same aspect of the crime as another does not suggest that the sentencing court considered any extraneous or improper evidence. The sentencing jury and judge considered only evidence of factors which could properly be considered by them. This case is appreciably different from *Stephens* because there the jury may have considered evidence that it could not constitutionally consider. In this case, no evidence considered was inappropriate for consideration. The sentencing judge's erroneous classification of that evidence as the aggravating circumstances permitted by statute should not constitutionally infect the sentence. On all of the evidence before him, he reached the determination that the death sentence was appropriate.

The state law premise was clearly set forth by the Florida Supreme Court in the opinion on the direct appeal, after it found that the killing was "especially heinous, atrocious, or cruel."

Consequently, even though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty. *Elledge v. State*, 346 So.2d 998 (Fla.1977); *State v. Dixon*, *supra*.

Ford v. State, 374 So.2d at 503. In *Elledge* the Florida Supreme Court set out its rationale for the rule. The court reasoned that in the absence of mitigating circumstances "so long as there are some statutory aggravating circumstances, there is no danger that nonstatutory circumstances have served to overcome the mitigating circumstances in the weighing process which is indicated by our statute." *Elledge v. State*, 346 So.2d at 1003 (emphasis in original). Consistent with its interpretation of the sentencer's role as "a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present," *id.* at 1003, (quoting *Dixon v. State*, 283 So.2d 1, 10

5. We note that this case is not binding precedent for the Eleventh Circuit since it is a decision by Unit A of the Former Fifth Circuit

made after October 1, 1981. *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1982).

(Fla.1973)), the court questioned whether the weighing process would have been different had the impermissible aggravating factor not been present. 346 So.2d at 1003. In *Elledge* the court declined to uphold the sentence because the sentencing judge had considered the impermissible aggravating circumstances and had found some mitigating circumstances. *Id.*

In *Ford*, however, no mitigating circumstances were found, and five of the statutory aggravating circumstances relied on by the sentencing judge were upheld. The court logically presumed the weighing process would have reached the same outcome even had the sentencing court not added to the scales those aggravating circumstances found impermissible. *Ford v. State*, 374 So.2d at 503. The Florida Supreme Court's review has achieved the goals of rationality, consistency and fairness enunciated in *Proffitt v. Florida*, 428 U.S. at 258-60, 96 S.Ct. at 2969-70, 49 L.Ed.2d at 926-27, and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

Nor did the trial court commit constitutional error in instructing the jury as to all aggravating and mitigating circumstances permitted by the statute. To ensure that the jury understands the structure of the law as required by *Proffitt*, it seems appropriate that they be charged fully on the Florida statute and provided proper instructions on the burden of proof and the standard of evidence required to prove the factors given, as they were here.

[5] In setting out the state law premise for the presumption that Ford's death sentence should be affirmed due to the existence of five statutory aggravating circumstances and no mitigating circumstances, we noted that the Florida Supreme Court considered whether the sentence would have been different had the sentencing judge found only the five aggravating circumstances upheld on appeal. The effect of such an evaluation seems very like the application of a harmless error rule. Therefore, we adopt Chief Judge Godbold's opinion as an alternative ground insofar as it is consistent with the reasoning set forth above.

IV.

Admission of Ford's Oral Confession

Ford was arrested in Gainesville, Florida on the day of the murder. He refused to talk with Gainesville police officers, indicating he first wanted to consult a lawyer. He was given an opportunity to talk to a public defender but refused to accept that representation. He was unable to reach his private attorney.

Fort Lauderdale police officers came to return Ford to Fort Lauderdale. The *Miranda* warnings were given and petitioner "wanted" to talk but would not give a written statement until he had contacted his lawyer. Petitioner's only statement at the time was "I didn't shoot that cop." On a small plane from Gainesville to Fort Lauderdale, another officer gave Ford *Miranda* warnings. Ford said he was willing to talk but would give no written statement until he had talked with his lawyer. After informing a Fort Lauderdale officer of his earlier unsuccessful effort to contact his attorney and his refusal of representation by the public defender, petitioner admitted participating in the Red Lobster robbery. Although denying participation in the killing, he admitted being left behind at the Red Lobster by his accomplices, seeing a police officer lying on the ground as he left the restaurant, and escaping in the police car which he abandoned for a green Volkswagen.

Ford claims admission of the above statement in his trial violated the Fifth, Sixth and Fourteenth Amendments and was contrary to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and its progeny, including *United States v. Priest*, 409 F.2d 491 (5th Cir.1969), and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). He argues that having invoked without waiving his right to counsel, his responses to subsequent police-initiated custodial interrogation without an attorney should not have been admitted into evidence. Additionally, petitioner contends

he received ineffective assistance of counsel in that he did not present the confession issue as a *Miranda* violation in the trial court and failed to raise it on appeal.

Petitioner moved to suppress his confession but failed to appeal the trial court's denial of his motion on direct appeal to the Florida Supreme Court. Based on *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the federal district court held Ford's failure to raise the issue on direct state appeal foreclosed its consideration in this habeas corpus proceeding.

A. Ineffective Assistance of Counsel

[6, 7] First we examine briefly petitioner's claim of ineffective assistance of counsel. Petitioner's attorney attempted to win the suppression of Ford's statement, and on the totality of circumstances in the entire record, rendered reasonably effective assistance in so doing. *Washington v. Watkins*, 655 F.2d at 1355. As the Supreme Court of Florida recognized in discussing this same claim, the statement admitted only presence and participation in the robbery; it denied participation in the shooting. "There was abundant evidence, apart from the confession, some by eye witnesses, to place him at the scene as a participant. Even disregarding petitioner's confession there was overwhelming evidence of guilt." *Ford v. State*, 407 So.2d at 909. In this circumstance, Ford was in no way prejudiced by any action or inaction of his attorney, even if his representation had fallen short of the dictates of the Sixth and Fourteenth Amendments. *Washington v. Watkins*, 655 F.2d at 1362-63.

B. *Wainwright v. Sykes*

[8] With regard to Ford's procedural default, the Florida law is clear. A criminal defendant's failure to raise an issue which could be asserted on direct appeal precludes consideration of the issue on a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. *Hargrave v. State*, 396 So.2d 1127 (Fla.1981). Accordingly, the state courts refused to consider Ford's contention in the collateral proceeding concerning the confession.

In *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), the Supreme Court held a state prisoner who knowingly and deliberately bypasses state procedures intentionally relinquishes known rights and can be denied habeas corpus relief on that basis. Recognizing *Fay* left open the possibility of "sandbagging" by defense lawyers, the Supreme Court narrowed its sweeping rule in *Wainwright v. Sykes*, 433 U.S. 72, 89, 97 S.Ct. 2497, 2507, 53 L.Ed.2d 594 (1977). The Court held that absent a showing of both cause for noncompliance and actual prejudice, habeas corpus relief is barred where a state prisoner has failed to comply with a state contemporaneous objection rule. 433 U.S. at 87, 97 S.Ct. at 2506.

While *Sykes* arose in the context of a procedural default at the trial level, we have applied its rationale in cases involving a procedural default during the course of a direct appeal from a state court conviction. See *Huffman v. Wainwright*, 651 F.2d 347 (5th Cir.1981); *Evans v. Maggio*, 557 F.2d 430, 433-34 (5th Cir.1977). Other circuits have applied *Sykes* in the same fashion. See *Forman v. Smith*, 633 F.2d 634, 640 (2d Cir.1980), cert. denied, 450 U.S. 1001, 101 S.Ct. 1710, 68 L.Ed.2d 204 (1981); *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir.), cert. denied, 449 U.S. 1004, 101 S.Ct. 545, 66 L.Ed.2d 301 (1980); *Gibson v. Spalding*, 665 F.2d 863, 866 (9th Cir.1981), vacated and remanded, — U.S. —, 102 S.Ct. 2229, 72 L.Ed.2d 842 (1982). Applying *Sykes* in this setting accrues the dual advantage of discouraging defense attorneys from omitting arguments in preparing appeals with the intent of saving issues for federal habeas corpus consideration and encouraging state appellate courts to enforce procedural rules strictly, thereby reducing the possibility the federal court will decide the constitutional issue without the benefit of the state's views. *Gibson v. Spalding*, 665 F.2d at 866; *Wainwright v. Sykes*, 433 U.S. at 90, 97 S.Ct. at 2508. Additionally, application of *Sykes* to the forfeiture of specific claims on appeal promotes the goals of comity and accuracy identified by the *Sykes* Court. *Forman v. Smith*, 633 F.2d at 639.

[9] Thus, in this Circuit a state prisoner can forego the opportunity to raise constitutional issues in habeas corpus proceedings by deliberately bypassing state appellate procedural rules or by merely failing to follow them without showing both cause for the default and prejudice resulting from it. Because this record does not reveal Ford's procedural default was the result of an intentional bypass within the meaning of *Fay*, we turn to the cause and prejudice exception of *Sykes*.

[10] Cause and prejudice are sometimes interrelated, *Huffman v. Wainwright*, 651 F.2d at 351. While the Supreme Court has not explicitly defined cause and prejudice, our precedents have defined "cause" sufficient to excuse a procedural default in light of the determination to avoid "a miscarriage of justice." *Id.* Prejudice means "actual prejudice" which in this case must result from the failure to appeal the trial court's admission of petitioner's statement. See *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Bucklew v. United States*, 575 F.2d 515, 519 (5th Cir.1978).

[11] A careful review of the record reveals the *Sykes* exception does not apply in this case. Ford's argument that the procedural default is excused because of the position of Florida courts at the time on the issue must fail. The claim was perceived and asserted in the trial court and therefore could have been asserted on appeal. *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting *Sykes*.

— U.S. at —, 102 S.Ct. at 1572, 71 L.Ed.2d at 802 (footnotes omitted).

Even addressed in terms of manifest injustice, see *Huffman v. Wainwright*, 651 F.2d 347 (5th Cir.1981), under the circumstances of this case, imposition of the *Sykes* forfeiture rule does not constitute a miscarriage of justice. Petitioner does not contest the accuracy of the statement made to the Fort Lauderdale police and, as noted in the discussion of petitioner's ineffective assistance of counsel claim, he was not prejudiced by admission of the statement.

V.

Standard by Which Aggravating Circumstances Must Outweigh Mitigating Factors

Florida Statute § 921.141(3)(b) requires the sentencing court, in imposing the death penalty, to state in writing its finding "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Petitioner contends that because the statute, case law and jury instructions do not require the state to prove that aggravating factors outweigh mitigating factors "beyond a reasonable doubt," Florida's death penalty statute, on its face and as applied in this case, denies convicted capital defendants due process. Ford argues that the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment. Since the element is part of the crime, he asserts that the beyond a reasonable doubt standard is required by *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and its progeny. Similarly, Ford presents his "subsidiary argument," which he claims the panel failed to consider, that the sentence should be reversed because neither the jury instructions nor the Florida statute require proof of the existence of aggravating circumstances beyond a reasonable doubt. We reject these arguments for several reasons.

[12] First, that the aggravating factors must outweigh the mitigating factors for

imposition of the death penalty under the Florida Statute is not an element of the crime of capital murder in Florida. Under the Florida bifurcated death penalty statute, the sentencing proceeding is entirely separate from trial on the capital offense. Indeed, in certain circumstances the state judge can summon different jurors for the latter phase. Fla.Stat. § 921.141(1). Guilt of the capital offense having already been decided, the sentencing jury's sole function is to render an advisory sentence aiding the state judge in determining whether the defendant should be sentenced to death or life imprisonment. *Id.* Thus, that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. at 364, 90 S.Ct. at 1072 (emphasis added), is irrelevant to deciding under the Florida statute whether there are insufficient mitigating circumstances. The aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed. As the Supreme Court explained:

While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. at 258, 96 S.Ct. at 2969, 49 L.Ed.2d at 926.

Second, the United States Supreme Court has declared constitutional on its face Florida's capital sentencing procedure, including its weighing of aggravating and mitigating circumstances. The Supreme Court stated:

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result,

the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Id. 428 U.S. at 258, 96 S.Ct. at 2969. The statute, facially constitutional, was strictly followed according to its terms.

[13] Third, Ford's argument under *In re Winship* seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974), and *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597, 617-18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party. Petitioner's contrary suggestion is based on a misunderstanding of the weighing process, the statute and the guiding and channeling function identified in *Proffitt v. Florida*, 428 U.S. at 258, 96 S.Ct. at 2969. Indeed, it appears no case has applied *In re Winship* in the manner Ford urges. The North Carolina and Utah cases cited by him which imposed a reasonable doubt standard in this situation turned on construction of state statutes rather than the due process rationale of *In re Winship*. See *State v. Johnson*, 298 N.C. at 74, 257 S.E.2d at 617; *State v. Woods*, 648 P.2d 71 (1981).

Ford's alternate argument, raised for the first time in his reply brief, is that the Florida capital sentencing proceeding involves new findings of fact significantly affecting punishment to which the full panoply of due process rights should be extended, including the requirement that the state prove beyond a reasonable doubt that aggravating factors outweigh mitigating factors. Again petitioner confuses proof of facts with the weighing process undertaken by the sentencing jury and judge. Because

the latter process is not a fact susceptible of proof under any standard, we reject this contention.

[14, 15] Finally, Ford contends his death sentence is unconstitutional for failure to require proof of the existence of aggravating circumstances beyond a reasonable doubt. Because this claim was never specifically briefed or raised before the panel, it is not now properly before this Court *en banc*. The requirement that the existence of aggravating circumstances be proved beyond a reasonable doubt is, however, a settled principle of Florida law. See *Jent v. State*, 408 So.2d 1024, 1032 (Fla.1981); *State v. Dixon*, 283 So.2d at 9. We note that in this case, as in nearly all cases, there is no dispute as to the facts on which the existence of the aggravating circumstances is based.

VI.

Florida Supreme Court's Standard of Review

Ford claims the Florida Supreme Court, in reviewing the evidence of aggravating and mitigating circumstances, violated the Eighth Amendment by failing to apply in his case the same standard of review applied in other capital cases. Specifically, he contends that under Florida case law, the court should have set aside two aggravating circumstances, collapsed two aggravating circumstances into one, and found the existence of one statutory mitigating circumstance and of nonstatutory mitigating circumstances.

[16] While petitioner characterizes this contention as the Florida Supreme Court's failure to apply a consistent standard of review in violation of *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), the district court correctly discerned that he is simply "quarreling" with the state court. Where in a capital punishment case the state courts have acted through a properly drawn statute with appropriate standards to guide discretion, *Proffitt v. Florida*, 428 U.S. at 258-59, 96 S.Ct. at 2969, federal courts will not undertake a case-by-

case comparison of the facts in a given case with the decisions of the state supreme court. *Spinkellink v. Wainwright*, 578 F.2d 582, 604-05 (5th Cir.1978), cert. denied, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979). This rule stands even though were we to retry the aggravating and mitigating circumstances in these cases, "we may at times reach results different from those reached in the Florida state courts." *Id.* at 605.

[17] The Supreme Court of Florida is the ultimate authority on Florida law and we do not sit to question its interpretation of that State's statutes. See *Tennon v. Ricketts*, 574 F.2d 1243, 1245 (5th Cir.1978), cert. denied, 439 U.S. 1091, 99 S.Ct. 874, 59 L.Ed.2d 57 (1979). Ford has not cited and we have not found any habeas corpus decision in which this Court has reversed a death sentence due to the state court's incorrect decision as to the existence or absence of aggravating and mitigating circumstances.

[18, 19] Moreover, examination of the relevant Florida Supreme Court decisions reveals that its review of petitioner's death sentence was not arbitrary, capricious or in disaccord with constitutional principles relating to sentencing in capital cases. The Florida Supreme Court reviewed the circumstances of Ford's case consistently with its principles governing the aggravating and mitigating circumstances at issue in this case, and no deficiency under *Godfrey* is stated. Under 28 U.S.C.A. § 2254(d), we presume correct the facts properly found by the state courts. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), after remand, — U.S. —, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). There is nothing in this record to show the Florida Supreme Court failed to apply the standard of review mandated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny.

VII.

Assistance of Counsel at Sentencing

Petitioner contends he received ineffective assistance of counsel at sentencing.

Specifically, he claims that although counsel called character witnesses and a psychiatrist to testify in mitigation, he "failed to focus the trial judge's and jury's attention on the critical factors relevant to the sentence determination." Careful review of the record and Ford's specific arguments reveals this contention is nothing more than an attack on the reasoned tactics and strategy of experienced trial counsel.

[20, 31] In reviewing ineffective assistance of counsel claims, we do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. *Washington v. Watkins*, 655 F.2d at 1355; *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980). We have consistently held that counsel will not be regarded constitutionally deficient merely because of tactical decisions. See *United States v. Guerra*, 628 F.2d 410 (5th Cir.1980), cert. denied, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); *Bucklew v. United States*, 575 F.2d 515 (5th Cir.1978); *United States v. Beasley*, 479 F.2d 1124, 1129 (5th Cir.), cert. denied, 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed.2d 158 (1973); *Williams v. Beto*, 354 F.2d 698 (5th Cir.1965). Even where an attorney's strategy may appear wrong in retrospect, a finding of constitutionally ineffective representation is not automatically mandated. *Baty v. Balcom*, 661 F.2d 391, 395 n. 8 (5th Cir.1981), cert. denied, — U.S. —, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); *Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir.1981).

[22, 23] That counsel for a criminal defendant has not pursued every conceivable line of inquiry in a case does not constitute ineffective assistance of counsel. *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir.1980).

This is not a case in which counsel allegedly failed to prepare and investigate adequately. Ford's counsel was reasonably likely to render and did render reasonably effective assistance. See *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir.1974). Because the record reveals Ford received constitutionally adequate representation and no prejudice resulted to him by any action or inaction of counsel, see *Washington v. Watkins*, 655 F.2d at 1362, Ford has not carried his burden of proving ineffective assistance of counsel. See *United States v. Killian*, 639 F.2d 206, 210 (5th Cir.), cert. denied, 451 U.S. 1021, 101 S.Ct. 3014, 69 L.Ed.2d 394 (1981).

The judgment denying habeas corpus relief is AFFIRMED, but the case is REMANDED to the district court for further proceedings as set forth in the per curiam opinion of the Court.

GODBOLD, Chief Judge, joined by CLARK, Circuit Judge, except as to the concurrence in Part V of the majority opinion, dissenting in part and specially concurring in part:

[6-23] I concur in Parts IV, V, VI and VII of the majority's opinion. I write to indicate my separate views on the remaining issues.¹

I.

I dissent from the majority's holding and treatment of the *Brown* issue, Part I of its opinion. The rationale, if not the narrow holding, of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality decision), prohibits an appellate court from relying on, that is, using as a factor in its decision, nonrecord information.²

Amendment, 430 U.S. at 362, 97 S.Ct. at 1206 (White, J., concurring), holds that in death cases there is a heightened need for reliable factual determinations. See also *Eddings v. Oklahoma*, 455 U.S. 104, 117, 102 S.Ct. 869, 877, 71 L.Ed.2d 1, 12 (1982) (O'Connor, J., concurring); *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d

1. I generally agree, however, with the reservations about Part V that are expressed in footnote 2 of Judge Kravitch's dissent.

2. In *Gardner*, the court decided that a trial judge may not to any extent impose a death sentence on the basis of nonrecord information. While *Gardner* failed to produce a majority opinion, a coherent rationale emerges from the case. The rationale, based either on the due process clause, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (plurality opinion), or the Eighth

In concluding that the Florida Supreme Court did not violate the assumed applicability of *Gardner* the majority understands the Florida Supreme Court to state that it did not rely on nonrecord material.³ I read the *Brown* opinion differently. It seems to me that the Florida Supreme Court, adopting the subjunctive mode in its opinion, has not directly stated that it did not actually rely on nonrecord information:

A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned functions. Plainly, it would not.

Brown v. Wainwright, 392 So.2d 1327, 1333 (Fla.1981) (emphasis added). Of course, the extrinsic material should not be used and would not be used by the court in the proper performance of its review function. But this definition of correct function simply begs the question whether in this particular set of circumstances, accidentally or otherwise, the extrinsic material actually was relied upon. I cannot find in the Florida Supreme Court's opinion what the majority, see n. 3, *supra*, describe as "the statement that it [extrinsic material] was not used." The disparate views that the judges of this court have expressed about the import of *Brown* convincingly demonstrate

the intractable ambiguity of the Florida Supreme Court's opinion. The majority read the Florida Supreme Court to state in *Brown* that it did not use extrinsic material, but Judge Johnson reads *Brown* to say that the Florida Supreme Court actually did consider such material (Judge Johnson's dissent at 872: "It is clear, therefore, from the *Brown* opinion that the Florida Supreme Court has considered nonrecord material"), and Judge Kravitch's opinion maintains that *Brown* raises a presumption that the Florida Supreme Court used nonrecord material (Judge Kravitch's dissent at 853).

The Florida Supreme Court, I believe, should address and squarely rule on whether it relied on nonrecord material in reviewing Ford's sentence. I would accept, without further inquiry, a direct statement by the Florida Court that it did not rely.⁴ Of course, if the Florida Supreme Court did rely on nonrecord information, *Gardner* was violated and the defendant must have a fresh appellate review of his sentence.

II.

While I concur in the majority's ultimate conclusion that the jury instructions regarding mitigating circumstances do not require

944, 961 (1976) (opinion of Stewart, Powell & Stevens, JJ.) ("there is a [special] . . . need for reliability in the determination that death is the appropriate punishment"). Because "debate between adversaries is often essential to the truthseeking function", 430 U.S. at 360, 97 S.Ct. at 1205 (plurality opinion), reliance on nonrecord information creates an unacceptable danger that death will be wrongly imposed. 430 U.S. at 359-62, 97 S.Ct. at 1205-1206 (plurality opinion); 430 U.S. at 264, 97 S.Ct. at 1207 (White, J., concurring).

The Florida Supreme Court held that *Gardner* does not apply to an appellate court because an appellate court does not "impose" a death sentence. *Brown v. Wainwright*, 392 So.2d 1327, 1332-33 (Fla.1981). Majority op. at 810 n. 2. The distinction between "imposition" and "review" of a death sentence ignores both *Gardner's* rationale and the integral role that the Supreme Court has envisaged for appellate review in death cases. See *Gregg v. Georgia*, 428 U.S. 153, 198, 205-06, 96 S.Ct. 2909, 2936, 2940, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell & Stevens, JJ.); *Id.* at

207, 223-24, 96 S.Ct. at 2941, 2948 (White & Rehnquist, JJ., & Burger, C.J., concurring).

3. But even if members of the court solicited the material with the thought it should, would or might be used in the review of capital sentences, the decision of the Florida court that it should not be so used, the statement that it was not used, and the rejection of the notion that it affected the judgment of the reviewing judges of the court ends the matter when addressed at the constitutional level. Majority op. at 811 (emphasis added).

4. Appellate courts routinely accept a trial judge's assurances that, although he has seen evidence, he has not relied upon it. The most common situation occurs where, in a bench trial, a judge examines evidence and then rules it inadmissible. See *Harris v. Rivera*, 454 U.S. 339, 346, 102 S.Ct. 460, 465, 70 L.Ed.2d 530, 536 (1981) ("in bench trials, judges routinely hear inadmissible evidence that they are presumed to ignore when making decisions"). Judge Tjoflat develops this point more fully at p. 833 of his separate opinion.

a grant of habeas, I find the majority's reasoning unacceptable.⁵

[4] As the majority correctly notes, we can decide the adequacy of the contested jury instructions only if the defendant demonstrates that he had cause for and was prejudiced by his conceded failure to raise the issue at trial. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In the context of jury instructions the Supreme Court has recently decided that prejudice means "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage." *U.S. v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982) (emphasis in original). Even though the jury probably did not consider the proffered evidence of non-statutory mitigating factors, (see Judge Kravitch's dissenting opinion at 835, for a summary of the proffered evidence) that evidence is unpersuasive. Using the *Frady* test, I cannot conclude that there is "a substantial likelihood that the erroneous . . . instructions prejudiced [the defendant's] chances with the jury." — U.S. at —, 102 S.Ct. at 1597-1598, 71 L.Ed.2d at 834.

III

In Part III of its opinion, the majority wrestles with the difficult issue of whether the Florida Supreme Court, after finding that three of the eight aggravating circumstances relied on by the trial judge were improper, must order that the defendant be resentenced. Like the majority, I believe that the constitution does not compel resentencing, but my reasons differ.

5. Relying in part on a sentence buried in the trial judge's findings written well after the jury had completed its deliberations, the majority asserts that the jury did not feel bound to consider only those mitigating factors explicitly listed in the Florida statute. Except in the situation where the overall jury charge explains or corrects an erroneous instruction, not applicable here, neither trial judge nor appellate court can "know" that a jury did not consider itself bound by any particular erroneous or misleading instruction.

6. In *Stephens*, the Court was confronted with an issue closely related to the one presently

As *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982),⁶ suggests, we must initially ask what the Florida Supreme Court's actions mean as a matter of state law. I interpret the Florida Supreme Court to apply a harmless error rule in refusing to order resentencing. The presumption, cited by the Florida court here, that death is appropriate where some aggravating and no mitigating circumstances are present cannot constitute a hard and fast rule of law. The Florida Supreme Court permits the trial judge and jury to forego the death sentence in just such circumstances. See *Williams v. State*, 386 So.2d 538, 543 (Fla.1980). The presumption must therefore constitute a harmless error rule that operates only where the initial sentencer has misapplied the sentencing statute. See *Henry v. Wainwright*, 661 F.2d 56, 58 (5th Cir.1981) (Unit B) (State interpreted Florida Supreme Court to apply a harmless error rule where death statute was misapplied below), vacated on other grounds, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982).

[5] The Florida Supreme Court's actions, so interpreted, pass constitutional muster in this case. See *Zant v. Stephens*, — U.S. —, —, 102 S.Ct. 1856, 1865, 72 L.Ed.2d 222, 235 (1982) (Powell, J., dissenting) ("I would leave open—also for the Supreme Court of Georgia to decide—whether it has authority to find that the instruction was harmless error beyond a reasonable doubt"); *Drake v. Zant*, 449 U.S. 999, 101 S.Ct. 541, 66 L.Ed.2d 297 (1981)

before us. There the jury found three aggravating and no mitigating circumstances and sentenced the defendant to death. The Supreme Court of Georgia held one of the aggravating circumstances invalid under the federal constitution but nevertheless affirmed the sentence. The Supreme Court certified the following question to the Supreme Court of Georgia: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of one of the statutory aggravating circumstances found by the jury?" — U.S. at —, 102 S.Ct. at 1859, 72 L.Ed.2d at 227-28.

Cite as 998 F.2d 984 (1993)

(White, J., dissenting to denial of cert.) ("Nor do I believe that the Constitution requires the Georgia Supreme Court to vacate the sentences if it fails to sustain the *Godfrey* aggravating circumstance. The cases now before us involve only sentencing, not guilt or innocence, and there is no constitutional right to jury sentencing."). As a matter of general constitutional policy I think it essential that appellate courts be able to employ a harmless error rule where the initial sentencer has found aggravating circumstances to outweigh mitigating circumstances by such a definitive margin. Otherwise the resultant procedural maze can be expected to subvert the judicial process in cases where the death sentence is imposed.

In *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), the Court held that the sentencer must be permitted to consider mitigating evidence relating to "any aspect of a defendant's character or record and any of the circumstances of the offense . . ." 455 U.S. at 110, 102 S.Ct. at 874, 71 L.Ed.2d at 8 (quoting *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion)). At some point the relevance of the defendant's proffered evidence becomes so attenuated that the trial judge will justifiably exclude it. But because it is not clear exactly where the line should be drawn, one can expect that the appellate court will, in many cases, find that the trial judge erred in excluding such evidence. Absent a harmless error rule, the death sentencing process will become so time-consuming and cumbersome that the death sentence will be imposed rarely and freakishly, in violation of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). I believe that the Supreme Court did not intend such a result.

General policy aside, existing precedent does not justify ordering resentencing here.

While the defendant has a constitutional right to be convicted by a jury, see *Street v. New York*, 394 U.S. 576, 585-87, 89 S.Ct. 1354, 1362-1363, 22 L.Ed.2d 572 (1969) (reversal required where jury considered improper legal theory in convicting defendant), he has no right to jury sentencing. Thus, use of the harmless error rule in this case violates the constitution only if it runs afoul of the principles established by the Court's death cases.⁷ Some have interpreted the requirements that the jury's discretion be channeled by adequate standards and that the sentence be rationally reviewed to imply that the trial judge and jury in every case must properly apply the statutory standards. See *Zant v. Stephens*, supra — U.S. at —, 102 S.Ct. at 1859, 72 L.Ed.2d at 228 (Brennan & Marshall, JJ., dissenting); *Westbrook v. Balkcom*, 449 U.S. 999, 101 S.Ct. 541, 66 L.Ed.2d 297 (1981) (Stewart, J., dissenting to denial of cert.); Judge Kravitch's dissenting op. at 840-841; Judge Johnson's dissenting op. at 875-876. I cannot agree. The requirements of adequate standards and rational review do not possess an immutable meaning that judges can immediately discern; they must be interpreted in light of their dual purposes of insuring reliable and consistent application of the death penalty. Use of a harmless error rule here frustrates neither purpose. Greater inconsistency is not a danger because the Florida Supreme Court's affirmance is based on the same discretion channeling standards that the jury and judge would use in resentencing the defendant. Presumably the Florida Supreme Court will apply its harmless error rule with an eye towards consistency. Use of a harmless error rule does not risk greater unreliability because the Florida Supreme Court bases its harmless error decision on the same evidence that the trial judge and jury would use on remand.

7. Use of a harmless error rule might also be unconstitutional where the appellate court affirms a death sentence based on a theory not considered at trial. Due process would seem to require that the defendant have an opportunity to advance legal arguments and introduce evi-

dence on the sentencing theory used. See *Prednell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978). Here the Florida Supreme Court affirmed the sentence based only on factors that were considered by the trial judge and jury.

Henry v. Wainwright, 661 F.2d 56 (5th Cir.1981), vacated on other grounds, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982) and *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), reh. denied and modified, 648 F.2d 446 (5th Cir.1981), certified to Supreme Court of Georgia, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), do not stand in the way of my conclusion that resentencing is not constitutionally required here. In both of those cases the standards used by the jury were held to violate the federal constitution. Here, in contrast, there is no suggestion that the judge's errors are of constitutional dimensions. I believe that the constitution does not prohibit use of a harmless error rule to correct mere errors of state law.

TJOFLAT, Circuit Judge, concurring in part and dissenting in part:

I.

The petitioner presents to this en banc court the following constitutional claims: (1) petitioner's oral confession should not have been admitted into evidence during his state court trial; (2) the state sentencing court improperly limited the advisory jury to considering only statutory mitigating factors in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (I will refer to this claim as the "Lockett claim"); (3) the sentencing court, in instructing the advisory jury and in making its own findings, failed to require that the existence of aggravating circumstances, and the finding that aggravating circumstances outweigh mitigating circumstances, be proved beyond a reasonable doubt; (4) petitioner's counsel was ineffective during the sentencing phase of petitioner's trial; (5) the Florida Supreme Court, in reviewing petitioner's capital sentence on direct appeal from the state trial court, violated the rule of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), by considering nonrecord material (I will refer to this claim as the "Brown claim," see *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981)); (6) the Florida Su-

preme Court's direct review of petitioner's sentence was inconsistent with its review of other capital sentences; and (7) the Florida Supreme Court impermissibly allowed petitioner's capital sentence to stand on direct appeal despite the sentencing court's reliance on three improper aggravating circumstances (I will refer to this claim as the "Stephens claim," see *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982)).

This court should address these claims in the following order: first, those challenging the validity of petitioner's conviction; second, those challenging the validity only of petitioner's sentence; and third, those challenging the validity only of the Florida Supreme Court's review of petitioner's sentence. I adhere to this procedure because if petitioner were to prevail on any claims in the first category, it would be unnecessary for us to address those in the latter two categories, because he would be entitled to a new trial. Similarly, if petitioner were to prevail on any claims in the second category, we would not have to address those in the third category because resentencing would be required.

Thus, petitioner's claim regarding the inadmissibility of his oral confession must be decided first because a holding in his favor would require a new trial on the issue of guilt. Next, if necessary, we must consider those claims that attack the validity of petitioner's sentence: the Lockett claim, the burden of proof claims, and the ineffective assistance of counsel claim. Finally, if necessary, we must consider those claims that attack the validity of the Florida Supreme Court's review of petitioner's sentence: the Brown claim, the inconsistency claim, and the Stephens claim.

[8-11, 16-23] I resolve these claims as follows: (1) There is no disagreement among the members of this court on the issue of the admissibility of petitioner's oral confession; therefore, I adopt the conclusion and the reasoning of the panel opinion, *Ford v. Strickland*, 676 F.2d 434, 437-39 (11th Cir.1982). *Wainwright v. Sykes*, 433

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U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), bars this claim; (2) Sykes bars petitioner's *Lockett* claim; (3) Sykes bars petitioner's claims that the existence of aggravating circumstances, and the finding that aggravating circumstances outweigh mitigating circumstances, must be proved beyond a reasonable doubt; (4) there is no disagreement among the members of this court over the disposition of petitioner's claim that his counsel was ineffective at the sentencing phase of his trial; therefore, I adopt the panel decision that petitioner failed to prove this claim, 676 F.2d at 443;¹ (5) I reach the merits of the *Brown* claim and hold that the Florida Supreme Court committed no constitutional error; (6) there is no disagreement among the members of this court regarding petitioner's proportionality claim; therefore, I adopt the panel opinion rejecting this claim on the merits, *id.* at 442-43;² (7) concerning petitioner's claim that the Florida Supreme Court

should not have allowed his sentence to stand in light of the sentencing court's reliance on three improper aggravating circumstances, I find this case indistinguishable from *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), and, therefore, I find it necessary to invoke the Florida certification procedure to obtain a clarification of Florida law.

I make no further mention of claims 1, 4, and 6 above because the panel decided them correctly. In order to decide the remaining claims, it is necessary to examine the procedural history of this case, particularly the stages at which petitioner raised his claims.

II.

Petitioner was convicted in the Circuit Court for Broward County, Florida, of first-degree murder. At the sentencing phase of petitioner's trial, the jury recommended the death penalty.³ The trial judge found eight aggravating circumstances and no mitigat-

1. Furthermore, I note that petitioner does not contend that he received an improper hearing either before the state circuit court on his motion for post-conviction relief or before the federal district court, on his claim of ineffective assistance of counsel. On the contrary, the state circuit court conducted an exhaustive hearing on this claim. The federal district court would have been well within its discretion merely to adopt the findings of the state court and deny petitioner the opportunity to present further evidence. In an abundance of caution, the federal district court did entertain such evidence. Petitioner asserts no reason for this court to question the findings and conclusions of the federal district court or of the state circuit court, both of which were able to judge the credibility of the witnesses who testified for petitioner regarding his claim of ineffective assistance of counsel.

2. I note that petitioner never presented his proportionality claim to the state courts and therefore never exhausted it. Because the state has not raised the exhaustion issue, however, it has waived it. *Lamb v. Jernigan*, 683 F.2d 1332, 1335 n. 1 (11th Cir.1982). See note 23 *infra*.

3. The Florida death penalty statute in force at the time of petitioner's offense and sentence provided:

§21.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

(1) SEPARATE PROCEEDINGS ON ISSUE OF PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital

felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to sentence, and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections [5] and [6]. Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) ADVISORY SENTENCE BY THE JURY.—After hearing all the evidence, the

ing circumstances, accepted the jury's recommendation, and sentenced petitioner to death. Petitioner alleges that the sentencing court committed two constitutional violations: first, it impermissibly restricted the jury to considering only statutory mitigating factors in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973

(1978); and second, it failed to require that both the existence of aggravating circumstances and the finding that aggravating circumstances outweigh mitigating circumstances be proved beyond a reasonable doubt. Petitioner did not call either of these alleged violations to the attention of the trial court.

jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

(a) Whether sufficient aggravating circumstances exist as enumerated in subsection [5].

(b) Whether sufficient mitigating circumstances exist as enumerated in subsection [6], which outweigh the aggravating circumstances found to exist; and

(c) Based on these considerations, whether the defendant should be sentenced to life [imprisonment] or death.

(3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist as enumerated in subsection [5], and

(b) That there are insufficient mitigating circumstances, as enumerated in subsection [6], to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections [5] and [6] and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) REVIEW OF JUDGMENT AND SENTENCE.—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) AGGRAVATING CIRCUMSTANCES.—Aggravating circumstances shall be limited to the following:

(a) The capital felony was committed by a person under sentence of imprisonment.

(b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.

(c) The defendant knowingly created a great risk of death to many persons.

(d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.

(e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

(f) The capital felony was committed for pecuniary gain.

(g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

(h) The capital felony was especially heinous, atrocious, or cruel.

(6) MITIGATING CIRCUMSTANCES.—Mitigating circumstances shall be the following:

(a) The defendant has no significant history of prior criminal activity.

(b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

(c) The victim was a participant in the defendant's conduct or consented to the act.

(d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.

(e) The defendant acted under extreme duress or under the substantial domination of another person.

(f) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

Fla.Stat. § 921.141 (1975).

On direct appeal, petitioner presented neither alleged constitutional violation to the Florida Supreme Court. Petitioner raised three other claims, none of which are before this court. The Florida Supreme Court affirmed petitioner's conviction and sentence, although it held that the sentencing court relied on three improper aggravating circumstances in imposing the death penalty.⁴ *Ford v. State*, 374 So.2d 496 (Fla. 1979). The United States Supreme Court denied certiorari. *Ford v. Florida*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner alleges that the Florida Supreme Court committed two constitutional violations on direct review of his conviction and sentence: first, it impermissibly considered nonrecord material; and second, it impermissibly affirmed petitioner's sentence despite holding that three of the eight aggravating circumstances the sentencing court relied on were invalid. Petitioner brought to the Florida Supreme Court's attention the first of these alleged constitutional errors when he joined with one hundred and twenty-two other persons in filing a petition for a writ of habeas corpus in the Florida Supreme Court. The petitioners challenged the court's alleged practice of considering nonrecord material in reviewing capital sentences. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). The Florida Supreme Court denied the writs, holding that no constitutional violation had occurred. *Id.* at 1330-33.

Petitioner next filed a motion in state circuit court for post-conviction relief under Florida Rule of Criminal Procedure 3.850. In support of this motion, petitioner argued for the first time, *inter alia*, the *Lockett* claim, and the burden of proof claims.⁵ The circuit court held that petitioner could not

raise these claims on collateral attack of his conviction and sentence.

Petitioner appealed the circuit court's denial of his motion for post-conviction relief to the Florida Supreme Court. *Ford v. State*, 407 So.2d 907 (Fla.1981). He sought to have the Florida Supreme Court decide the merits of the *Lockett* claim and the burden of proof claims by also filing a petition for a writ of habeas corpus. *Id.* at 908. In support of this petition, petitioner alleged that his appellate counsel was ineffective in failing to raise these claims before the Florida Supreme Court on direct appeal. He asked the court to grant him belated appellate review of these claims. The court rejected the ineffective assistance of appellate counsel claim,⁶ and affirmed the circuit court's determination that petitioner could not raise the *Lockett* claim or the burden of proof claims on a motion for post-conviction relief: "[These claims] were all matters known at the conclusion of the trial which could have been, but were not, raised on direct appeal. Accordingly, collateral attack . . . was properly determined by the trial court not to be an appropriate remedy . . ." *Id.* Thus, the petitioner's failure to raise these claims either before the circuit court, during the criminal prosecution, or on direct appeal constituted a procedural default.

Next, petitioner filed this application for a writ of habeas corpus in federal district court. Before the district court, the petitioner raised all of the claims that now concern the en banc court: the *Lockett* claim, the burden of proof claims, the *Brown* claim, and the *Stephens* claim. Petitioner raised the first two claims despite his procedural default before the state courts.⁷

4. See note 21 *infra*.

5. In his motion for post-conviction relief before the circuit court, the petitioner also claimed that his trial counsel was ineffective. See note 1 *supra*. Petitioner did not raise the claim that the Florida Supreme Court impermissibly failed to require resentencing despite the invalidity of three out of eight aggravating circumstances, *i.e.*, the *Stephens* claim; he never raised this

claim in any state proceeding. See note 23 *infra*.

6. The court also affirmed the circuit court's holding that petitioner did not prove ineffective assistance of his trial counsel.

7. Petitioner raised the *Stephens* claim despite his failure to exhaust his state remedies. See note 23 *infra*.

The district court ruled that because petitioner had made no showing of cause and prejudice to satisfy the standard of *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), he was barred from challenging in federal court on a petition for a writ of habeas corpus the state court's instructions to the jury at the sentencing phase of the trial. Therefore, Sykes barred consideration of the *Lockett* claim and the claim that aggravating circumstances must be proved beyond a reasonable doubt. The district court denied on the merits petitioner's claim that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt,⁸ his *Brown* claim, and his *Stephens* claim.⁹

The petitioner then appealed to this court. A panel of this court rejected on the merits each of petitioner's claims now under consideration.¹⁰ The panel reached the merits of the *Lockett* claim despite the district court's holding that Sykes was dispositive of this claim and despite the state's reliance on Sykes in its brief. Answer Brief of Respondents/Appellees at 27-31. The case now comes before this en banc court.

III.

Having recounted the procedural history of the case, I turn to the issues raised by petitioner's claims. Petitioner's first claim is that the following jury instruction violated *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978): "As to aggravating circumstances . . . you shall consider only the following: [the court then recited

the statutory factors]. As to mitigating circumstances . . . you shall consider the following [the court then recited the statutory factors]."¹¹ State Trial Transcript at 1347-49. Petitioner complains that although the court omitted the word "only" in connection with reciting the mitigating factors, the instruction was ambiguous enough that a reasonable juror could have thought he was precluded from considering nonstatutory mitigating factors.

Because petitioner never objected to the above instruction at trial or on direct appeal, the cause and prejudice standard of Sykes applies. The question of cause is a factual inquiry on which petitioner has the burden of proof. Petitioner never introduced any evidence, other than the record of the state court prosecution, to prove cause before the district court. Petitioner's belated attempt to argue cause before this court is no substitute for the introduction of evidence at the district court level. Our appellate function is not to determine legal issues in the abstract or to find facts, but to decide whether the trial court erred. Because the trial court was faced with no direct evidence that would explain why petitioner's attorney failed to object to the challenged instruction, it cannot be seriously contended that the trial court erred in holding that Sykes bars petitioner's claim.

Petitioner's argument that "reasonably effective counsel" would not have foreseen his *Lockett* claim at the time of his state court trial, Brief for Petitioner-Appellant at 36-37, misses the mark. The relevant ques-

tion because petitioner had committed a procedural default and because he did not satisfy the Sykes cause and prejudice standard.

In addition, before the panel, the petitioner argued only that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt. He did not argue, at least in his initial brief, that aggravating circumstances must be proved beyond a reasonable doubt. The panel opinion does not address the latter claim. Technically, therefore, this claim is not properly before this en banc court.

8. The district court did not apply Sykes to bar petitioner's claim that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt because petitioner did not raise this claim in district court as an attack on the state court jury instructions. As discussed in Part IV *infra*, the district court erred in failing to apply Sykes to this claim.

9. The state did not raise petitioner's failure to exhaust the lattermost claim in state court. See note 23 *infra*.

10. The panel did not reach the merits, however, of the constitutionality of petitioner's oral con-

11. See note 3 *supra*.

tion is not what "reasonably effective counsel" would have foreseen, but whether petitioner's attorney had cause not to object to the challenged instruction. This question cannot be answered in the abstract, but must be based on what counsel actually knew and his reasons for not objecting at trial. The possibility the state raises, Answer Brief of Respondents-Appellees at 29-30, that counsel's choice not to object was based on strategic considerations, cannot be lightly dismissed.

Petitioner admits that he was not precluded from introducing evidence on nonstatutory mitigating factors during the sentencing phase of his trial. Furthermore, petitioner admits that he introduced such evidence.¹² Supplemental Brief for Petitioner-Appellant on Rehearing En Banc at 19 n. 7. The introduction of such evidence, coupled with counsel's request that the jury not be instructed at all on aggravating and mitigating factors, State Trial Transcript at 1309, strongly suggests that counsel's strategy was to direct the jury's attention away from the instruction and toward the evidence presented, in order to allow himself the widest possible latitude in arguing his case to the jury. Thus, counsel sought to ensure that the jury would receive the issues as he had framed them, rather than as framed by the court in the form of an instruction.

The court declined counsel's request that the jury not be instructed on such factors. Counsel then asked that the jury not re-

ceive a written instruction on such factors, and the court acceded to this request. Thus, counsel was still able to focus the jury's attention on nonstatutory mitigating evidence. Counsel's request that the jury not receive a written instruction reinforces the conclusion that counsel's failure to object to the instruction was a carefully chosen trial stratagem.¹³

Counsel no doubt thought that had he objected to the instruction, his objection would have been overruled, and the court may have then prevented him from introducing evidence on nonstatutory mitigating factors or from arguing them to the jury. Counsel was faced with the choice of foregoing a favorable jury instruction but being allowed to introduce favorable evidence and to exploit such evidence to the fullest extent before the jury, or of attempting to procure a favorable instruction but, by alerting his opponent and the court to the issue, risk an adverse ruling not only on the instruction, but also on the evidence. Counsel chose the first alternative. This is precisely the type of deliberate tactical choice the Sykes standard is meant to address.

In conclusion, analysis of the state court trial record demonstrates clearly that petitioner's failure to object was a matter of trial strategy. The petitioner has come forward with no evidence to the contrary; I conclude that, because he has failed to satisfy the "cause" prong of the "cause" and "prejudice" test of *Wainwright v. Sykes*, his *Lockett* claim is barred. I concur, there-

12. My resolution of the cause issue makes it unnecessary for me to decide the question of prejudice. Nevertheless, I note that petitioner's introduction of evidence on nonstatutory mitigating factors, and the trial court's allowance of argument on such evidence, strongly suggests that petitioner could not have been prejudiced by the challenged instruction, which at worst was merely an ambiguous instruction to an advisory jury. The state never even attempted to exploit this ambiguity. Petitioner's claim that this perhaps ambiguous instruction, which enabled his attorney to present his case to the jury in the best light possible, resulted in a "miscarriage of justice," Supplemental Brief for Petitioner-Appellant on Rehearing En Banc at 24 n. 11, borders on the frivolous.

13. Also supporting this conclusion is petitioner's failure ever to ask his trial attorney why he had failed to object to the challenged instruction. At petitioner's state hearing on his motion for post-conviction relief, he called other attorneys to testify about his former counsel's incompetence but he never called his former counsel, who was present at the hearing. At his federal habeas hearing, petitioner did call his state trial counsel, but still avoided questioning him about his failure to object to the *Lockett* instruction. Thus, petitioner's failures at both the state and federal levels to question his former counsel about counsel's reasons for not objecting further support the conclusion that counsel's failure to object was a deliberate trial stratagem.

fore, in the result the majority reaches on this issue.¹⁴

IV.

Next, petitioner claims that both the existence of aggravating circumstances and the finding that aggravating circumstances outweigh mitigating circumstances must be proved beyond a reasonable doubt. He raises these claims now as an attack on the trial court's failure either to instruct the jury on the proper burden of proof or to apply the proper burden of proof, later, in making its own findings.¹⁵ I hold that Sykes bars these claims.

Petitioner failed to raise any of the above attacks at trial or on direct appeal. Aside from that fact, petitioner has been totally inconsistent in raising these claims on state and federal collateral attack of his conviction and sentence. As discussed in Part II *supra*, petitioner raised his attack on the jury instructions on his motion for state post-conviction relief. The Florida Supreme Court barred this attack because of petitioner's failure to raise it on direct ap-

peal. *Ford v. State*, 407 So.2d at 908. The federal district court held that Sykes barred this attack. I would affirm this holding.

In federal district court, petitioner attacked for the first time the trial court's failure to apply the proper burden of proof in making its own findings. Clearly, this was a "matter known at the conclusion of the trial," *Ford v. State*, 407 So.2d at 908, and, therefore, it also should have been raised on direct appeal. Petitioner's failure to do so is just as clearly a procedural default as is his failure to contest the jury instructions either at trial or on direct appeal. I believe the district court erred in reaching the merits of this claim.

This court is, therefore, faced with a clear state procedural default on these attacks. In reaching the merits of them, the majority adopts the practice, with which I vehemently disagree, of picking and choosing when to apply the Sykes standard.¹⁶ It is totally inconsistent for the majority to bar petitioner's Lockett claim on Sykes grounds but to reach the merits of petitioner's bur-

constitutional pronouncement from a federal court to tell the lawyer he has a basis for an objection. It also would discard the lawyer's traditional obligation to object when he thinks error detrimental to his client is being committed. Moreover, it would ensure that the state courts would be precluded from interpreting the Federal Constitution because such courts would be confronted only with those constitutional claims on which a federal court has spoken authoritatively. This result would fly in the face not only of Sykes, but of every case ever to recognize that in our federal system, it is a basic notion that state judges are obligated to, and do, uphold the Constitution in the same manner as do their federal counterparts.

14. Because of the importance of applying the proper analysis to determine "cause" under Sykes, I must comment on Judge Kravitch's dissenting opinion. We have stated: "One of the major concerns expressed by the Court [in Sykes] was to eliminate 'sandbagging' by defense lawyers who consciously chose to raise constitutional claims for the first time in a federal habeas proceeding." *Huffman v. Wainwright*, 651 F.2d 347, 351 (5th Cir.1981) (citation omitted). Judge Kravitch's opinion, however, actually would encourage sandbagging. Judge Kravitch decides that petitioner need not have objected to an instruction that he now challenges, because state law was unfavorable to the merits of his claim and no authoritative, federal pronouncement on the constitutional basis for the challenge existed, at the time of trial. Opinion of Kravitch, Circuit Judge, at 858. This approach would relieve the defense lawyer of any obligation to object to the law the trial court has determined to apply, although such law is unfavorable to his client, and although an objection at trial is the only way the issue can properly be preserved for appeal to the state appellate courts. Indeed, Judge Kravitch's approach, by allowing counsel to forego an objection in state court and later to raise it in federal court, would implicitly instruct counsel not to object unless the federal constitutional right is already well established. This interpretation of "cause" would render a state's contemporaneous objection rule wholly inapplicable when there was no authoritative

15. See note 10 *supra*. I note that petitioner could have raised these claims in state court either on state grounds, *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), cert. denied, 418 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974), or on federal grounds. This court is concerned, however, only with petitioner's federal grounds. Whether petitioner's claims are supported by state law is irrelevant to whether the Federal Constitution compels the result for which petitioner contends.

16. The district court's failure to apply Sykes to the claim that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt does not excuse the majority's failure to do so.

den of proof claims, without even acknowledging that a Sykes problem exists as to the latter claims.

Although I concur with the result the court reaches on this issue, I do not adopt its reasoning.¹⁷

17. Because of the majority's resolution on the merits of the question whether aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt, and in response to the dissent of my brother Anderson, I am compelled to state my own preliminary views on this issue.

I believe Judge Anderson's characterization of the process of weighing aggravating circumstances against mitigating circumstances as a "finding of fact." Opinion of Anderson, Circuit Judge, at 878, is "clearly erroneous." In determining whether aggravating circumstances outweigh mitigating circumstances, the sentencer makes no finding of fact, but rather engages in a normative determination whether the circumstances of the case are such that the death penalty may properly be imposed. By determining that one set of circumstances outweighs the other, the sentencer makes a normative, policy decision. The sentencer in effect determines state sentencing policy by formulating a norm, based on the facts of the case before it, to be followed by other sentencers in similar cases. The sentencer, therefore, acts not as factfinder, but as policymaker.

The Supreme Court has made it clear that such decisions as whether aggravating circumstances outweigh mitigating circumstances are normative determinations that must be consistent with each other. For example, in upholding the constitutionality of the Florida capital punishment scheme, the Court stated:

Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life. Moreover, their decisions are reviewed to ensure that they are consistent with other sentences imposed in similar circumstances. Thus, in Florida, as in Georgia, it is no longer true that there is "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."

Proffitt v. Florida, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976) (quoting prior decisions). And in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Court stated:

[O]ne of the most important functions any jury can perform in making such a selection [as whether to impose capital punishment] is to maintain a link between contemporary community values and the penal system—a link without which the determination of pun-

ishment could hardly reflect "the evolving standards of decency that mark the progress of a maturing society."

Id. at 519 n. 15, 88 S.Ct. at 1775-76 n. 15, quoting *Trop v. Dulles*, 356 U.S. 86, 101, 78 S.Ct. 590, 598, 2 L.Ed.2d 630 (1958).

The inquiry does not end, however, with a determination that whether aggravating circumstances outweigh mitigating circumstances is a normative, policy decision rather than a finding of fact. The majority states: "The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party." Majority Opinion at 818. The majority seems to believe that this statement ends the inquiry. Although I believe the court's statement that one does not apply a standard of proof to a weighing process is correct, it is possible to apply a standard of confidence to such a process. Therefore, the court does not adequately address my brother Anderson's argument that there is no logical obstacle to requiring the jury to have "a high degree of confidence" in its determination that aggravating circumstances outweigh mitigating circumstances. Opinion of Anderson, Circuit Judge, at 879.

Having determined that one could impose a high standard of conviction on a sentencing, policy decision, the question becomes whether there is any constitutional requirement that this court do so in this case. It is this question which I do not answer because of my disposition of this claim on Sykes grounds. Preliminarily, I am inclined to believe that relevant to this inquiry would be the significant due process protections already embedded in the Florida capital punishment scheme, many of which the Supreme Court recognized in holding in *Proffitt*, 428 U.S. at 259, 96 S.Ct. at 2970, that the Florida scheme "passes constitutional muster." These protections include: a separate evidentiary hearing before an advisory jury and the sentencing judge to determine the appropriate sentence, Fla.Stat. § 921.141(1); a recommended sentence by an advisory jury, *id.* § 921.141(2); the requirement that the trial court, in imposing the death sentence, "set forth in writing its findings upon which the sentence . . . is based," including the existence of aggravating and mitigating circumstances and the determination that aggravating circumstances outweigh mitigating circumstances, *id.* § 921.141(3); and independent appellate review to determine that the capital sentence is warranted and is not disproportionate, *id.* § 921.141(4). See note 3 *supra*.

V.

[2] Petitioner's next claim is that the Florida Supreme Court violated his constitutional rights by considering nonrecord material in reviewing his capital sentence.¹⁸ The petitioner argues that such consideration denied him the opportunity to attack the credibility of such materials in an adversarial manner. He bases this argument on *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which held invalid on due process grounds the imposition of a capital sentence based in part on material that the petitioner had no opportunity to challenge. Because I believe *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981) is dispositive, I concur in the majority's disposition of this claim.

Before addressing petitioner's constitutional claim, this court must first determine whether the Florida Supreme Court relied on nonrecord material in affirming petitioner's sentence. The crucial distinction, which I believe is never articulated clearly enough in the majority opinion, is whether the Florida Supreme Court relied on the material or merely read it. If only the latter is true, then I believe this court is faced with no constitutional question. I can fathom no constitutional rule, from *Gardner* or any other authority, that would preclude an appellate court from merely reviewing nonrecord material without relying on such material in the performance of its appellate function. Because the *Brown* opinion makes clear that the court indeed did not rely on nonrecord material in reviewing petitioner's sentence, I find it unnecessary, as does the majority, to address the claimed constitutional violation.

18. This material allegedly included "pre-sentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel." *Brown*, 392 So.2d at 1330 (footnote omitted).

19. I cannot agree with Judge Kravitch that the Florida Supreme Court's discussion of *Gardner* implies that the court believed there was "no state law barrier" to its reliance on nonrecord

In *Brown*, the Florida Supreme Court considered the contention of one hundred and twenty-two persons, including petitioner in this case, that the court's practice of considering nonrecord information in reviewing capital sentences was unconstitutional. For purposes of addressing the claimed violation, the court assumed that it had engaged in the practice of requesting and receiving nonrecord information and that it had reviewed such information. Nevertheless, the court held: "[O]ur view of the nonrecord information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence." 392 So.2d at 1331.

The court then described its two functions in reviewing capital sentences: "First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 [the Florida capital punishment statute] and our case law The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide." *Id.* The court then stated: "The record of each proceeding, and precedent, necessarily frame our determinations in sentence review. Our opinions, of course, then expound our analysis. Factors or information outside the record play no part in our sentence review role." *Id.* at 1332. Finally, after discussing *Gardner*,¹⁹ the court stated: "It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence review." *Id.* at 1332-33.

material. Opinion of Kravitch, Circuit Judge, at 851. This statement ignores all of the language quoted above. Rather, the court clearly held that under state law it did not rely on nonrecord material. I do not believe the court's obligatory reference to *Gardner* alters that holding.

20. I note now that although the Florida Supreme Court explained its sentence review function in *Brown*, this court, to decide petitioner's Stephens claim, still needs further dis-

Not only is the foregoing language a clear statement of state law, as the majority recognizes, but it is also a clear statement of the procedure the court used in reviewing petitioner's claim. First, Ford was a party in *Brown*. Second, although the Florida Supreme Court stated that in the future it would deny class status to habeas claims similar to the one before it, *id.* at 1330, the court considered the claims of all petitioners, not just *Brown*, and, in explicating a rule of law, effectively stated that it did not rely on nonrecord material in reviewing the sentences of any of the petitioners. The court speaks of petitioners in the plural throughout the *Brown* opinion. The Florida Supreme Court has thus made clear that it did not rely on nonrecord material in reviewing petitioner's sentence.

In the face of this clear holding, the petitioner nevertheless argues that the court did rely on such material. The petitioner states: "To conclude that in a judgmental process [of the sort in which the court engages] the intrusion of extra-record psychiatric and psychological assessments of the petitioner and similar materials, especially when solicited by the court from the Department of Corrections in connection with the appeal, 'play no part in our sentence review role,' [quoting *Brown*] is to misconceive reality." Brief for Petitioner-Appellant at 67-68. Petitioner's argument is that although the members of the Florida Supreme Court may not have consciously relied on nonrecord material in reviewing his sentence, such information could not have been disregarded by the judges in this case. Petitioner argues: "It simply is not part of human nature to ignore what we have asked to see." Supplemental Brief for Petitioner-Appellant on Rehearing En Banc at 13. Although petitioner recognizes that the premise that judges can disregard that which they must disregard is one of the most basic of our system of justice, petitioner still attacks this premise by asking this court to carve out an exception when judges have requested, rather than passively received, nonrecord materials.

rification of that court's role in reviewing capital sentences. See Part VI *infra*.

My response to this argument is twofold. First, I see no logical basis for distinguishing between the two situations. If one accepts that judges are capable of disregarding nonrecord information, as this court must, such capability logically does not depend on how this information is obtained. Second, assuming that petitioner's distinction is conceptually valid, adoption of such a distinction would be totally unworkable. Considering the frequency with which judges view nonrecord information, countless claims would arise that the judge viewed information that he could not disregard. Under petitioner's analysis, these claims would turn on the factual issue whether the judge requested the information or passively received it. The burden of such a rule on the administration of justice would be staggering. Therefore, petitioner's argument must be rejected.

Although the premise that judges can and do disregard that which they must disregard is a basic and, indeed, an absolute notion in our system of justice, this premise may in some instances be overridden by the equally fundamental notion that "justice must satisfy the appearance of justice." *Offutt v. United States*, 348 U.S. 11, 14, 75 S.Ct. 11, 13, 99 L.Ed. 11 (1954). There are circumstances in which the appearance of impropriety arising from the court's consideration of prejudicial evidence is so great that the judge must step down. The judge steps down not because the judicial system assumes he is incapable of performing but because the appearance of impropriety to society at large is too detrimental to the judicial system.

Petitioner has never made this latter argument, however; rather, he has merely attacked the premise that judges can disregard nonrecord materials. Because petitioner makes no assertion that as a matter of federal constitutional law, members of the Florida Supreme Court should be forced to step down in this situation on the ground of appearance of impropriety, I intimate no view on this claim.

Based on the preceding analysis, I concur in the result the majority reaches on this claim.

VI.

The final question petitioner presents to this court is the constitutionality of the Florida Supreme Court's decision, on direct appeal, to uphold petitioner's sentence despite holding first, that two of the aggravating circumstances on which the sentence relied were not supported by the evidence, and second, that two other aggravating circumstances the sentencer found should have been considered as being only

one such circumstance. *Ford v. State*, 374 So.2d at 501-03.²¹ The court upheld the sentence because there still existed five proper aggravating circumstances and no mitigating circumstances.²² The court stated: "[E]ven though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty." *Id.* at 503. Because I believe *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), controls the disposition of this claim, I respectfully dissent from Part III of the majority opinion.²³

21. The court held that the evidence did not support the following circumstances: "[t]he capital felony was committed by a person under sentence of imprisonment," Fla.Stat. § 921.141(5)(a), and "[t]he defendant was previously convicted of another capital felony involving the use or threat of violence to the person," *id.* § 921.141(5)(b). The court held that the following two aggravating circumstances were in fact only one such circumstance: "[t]he capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of . . . any [robbery or certain other enumerated crimes], *id.* § 921.141(5)(d); and "[t]he capital felony was committed for pecuniary gain," *id.* § 921.141(5)(f).

22. See note 3 *supra*.

23. Initially, I note that petitioner never raised this claim in state court. I assume the state provided this court with all of petitioner's "briefs on appeal," as mandated by 28 U.S.C. § 2254, Federal Habeas Rule 5, including any briefs filed in support of petitioner's motion for rehearing in the Florida Supreme Court. I can discern no *Stephens* claim from any of these materials.

Petitioner could have raised his *Stephens* claim in state court by petitioning the Florida Supreme Court for rehearing, Fla.R.App.P. 9.330, or by filing a petition for a writ of habeas corpus invoking the Florida Supreme Court's original jurisdiction, Fla.R.App.P. 9.100. Had the state opposed petitioner's claim in the district court for want of exhaustion, we would be required to dismiss the claim. See *Rose v. Lundy*, — U.S. —, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982). Under *Lamb v. Jernigan*, 683 F.2d 1332, 1335 n. 1 (11th Cir.1982), the state waives the exhaustion requirement by failing to raise it, which is what occurred here. Therefore, under *Lamb* this court should consider petitioner's *Stephens* claim.

Moreover, the *Stephens* case itself implicitly compels this court to reach the merits of petitioner's claim despite petitioner's failure to exhaust. As discussed in the text, *Stephens* controls this case because it presented the same issue to the Supreme Court that now faces this court. In *Stephens*, *Stephens* attempted to exhaust his state remedies by filing a petition for writ of habeas corpus in the Georgia Supreme Court. *Stephens v. Hopper*, 241 Ga. 596, 247 S.E.2d 92, cert. denied, 439 U.S. 991, 99 S.Ct. 593, 55 L.Ed.2d 667 (1978). In that petition, *Stephens*' complaint was that that court's affirmation of his sentence despite the invalidity of one aggravating circumstance was impermissible "because presenting evidence to the jury to support that invalid aggravating circumstance was prejudicial error." 241 Ga. at 603, 247 S.E.2d at 97. *Stephens* did not argue, however, that the Georgia Supreme Court's earlier action in affirming his sentence "create[d] such potential for the intrusion of arbitrary influences into his sentence as to violate his constitutional rights." . . . *Stephens v. Zant*, 631 F.2d 397, 405 (5th Cir.1980), modified, 648 F.2d 446 (5th Cir.1981). Instead, this amorphous claim was first raised in federal court on *Stephens*' application for a writ of habeas corpus. Although these claims are related, they are very different; the Georgia Supreme Court could not have been apprised of petitioner's federal constitutional claim by his invocation of his state evidentiary claim. Therefore, *Stephens* also involved a case of failure to exhaust state remedies.

Despite *Stephens*' failure to exhaust the claim he presented to the federal courts, and, as I discuss in the text at 842-843 *infra*, although the Supreme Court could not decipher petitioner's claim because such claim had not been exhausted, the Supreme Court noted that *Stephens* had "exhaust[ed] his state post-conviction remedies," — U.S. at —, 102 S.Ct. at 1855 (emphasis added), and proceeded to address the merits of his claim. Apparently, the Court believed it was enough that *Stephens*

In *Zant v. Stephens*, Stephens had been convicted of murder in Georgia Superior Court. The sentencing jury found three statutory aggravating circumstances and sentenced Stephens to death. On direct appeal, the Georgia Supreme Court affirmed Stephens' sentence, but held that one of the three aggravating circumstances relied on by the jury was invalid. *Stephens v. State*, 237 Ga. 259, 227 S.E.2d 261, cert. denied, 429 U.S. 986, 97 S.Ct. 508, 50 L.Ed.2d 599 (1976). After attempting to exhaust his state remedies,²⁴ Stephens petitioned the federal district court for a writ of habeas corpus. The district court denied the writ, but on appeal this court struck down Stephens' death sentence because: "It cannot be determined with the degree of certainty required in capital cases that the instruction [which included the improper aggravating circumstance] did not make a critical difference in the jury's decision to impose the death penalty." *Stephens v. Zant*, 631 F.2d 397, 406 (5th Cir.1980), modified, 648 F.2d 446 (5th Cir.1981).

On certiorari to the Supreme Court, the Court stated the issue before it as follows: "Today, we are asked to decide whether a

reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." *Zant v. Stephens*, — U.S. at —, 102 S.Ct. at 1857. In deciding this issue, the Court first identified the state law rule on which the Georgia Supreme Court relied in affirming Stephens' sentence: "'Where two or more statutory aggravating circumstances are found by the jury, the failure of one circumstance does not so taint the proceedings as to invalidate the other aggravating circumstance found and the sentence of death based thereon.'" *Id.* at —, 102 S.Ct. at 1858, quoting *Gates v. State*, 244 Ga. 587, 599, 261 S.E.2d 349, 358 (1979), cert. denied, 445 U.S. 938, 100 S.Ct. 1332, 63 L.Ed.2d 772 (1980). The Court then stated: "Despite the clarity of the state rule we are asked to review, there is considerable uncertainty about the state law premises of that rule." *Id.* at —, 102 S.Ct. at 1858 (footnote omitted). Because the Court could not decide the question before it without first determining the state law premises of the rule under consideration, the Court invoked the Georgia certification procedure to ob-

had exhausted his state post-conviction remedies, and that he did not have to exhaust each of his claims. The following considerations negate any suggestion that the Court believed that Stephens had exhausted his claim: first, the Court's failure to say so explicitly; second, both this court's and the Supreme Court's failure to mention, in discussing the merits of his claim, the Georgia Supreme Court's opinion in *Stephens v. Hopper*, the only case in which Stephens may have exhausted his claim. Presumably, if petitioner had exhausted his claim before the Georgia Supreme Court, that court's decision would have been relevant to this court and to the Supreme Court; and third, the Supreme Court's need to invoke the Georgia certification procedure to obtain clarification on a state law question. As discussed below, such clarification probably would have been unnecessary had the Georgia Supreme Court had a chance to rule on petitioner's claim. In sum, one must conclude that the Supreme Court did not believe that petitioner had exhausted his claim.

Because Stephens did not exhaust his claim, and because the Court reached the merits of that claim, *Stephens* compels this court also to reach the merits of petitioner's claim, despite his failure to exhaust. If Stephens did not

require this court to reach the merits of petitioner's claim, I would be inclined to dismiss the petition without prejudice to petitioner exhausting his claim in state court, despite the state's failure to raise the exhaustion issue. Had petitioner in this case, and respondent in *Stephens*, properly exhausted their claims, this court, and the Supreme Court, might have had the benefit of a much clearer presentation of the constitutional issue. Indeed, in *Stephens* the Court was compelled to invoke the Georgia certification procedure in order to seek clarification on a state law question. — U.S. at —, 102 S.Ct. at 1859. Had the Georgia Supreme Court initially had a chance to rule on the claim, and in so ruling, the chance to explain its rationale, the United States Supreme Court may have found it unnecessary to invoke the state certification procedure. This court is now faced with the same problem. Because of unclear state law, which might have been clarified had petitioner properly exhausted his claim, I believe it is necessary to invoke the Florida certification procedure, which this court is compelled to do under *Zant v. Stephens*.

24. See note 23 *supra*.

tain clarification on this state law point. *Id.* at —, 102 S.Ct. at 1859. As of the date of this opinion, the United States Supreme Court has not ruled further on *Zant v. Stephens*.

The majority attempts to distinguish *Stephens* by stating: "This case is appreciably different from *Stephens* because there the jury may have considered evidence that it could not constitutionally consider. In this case, no evidence considered was inappropriate for consideration." Majority Opinion at 814. This distinction is totally unpersuasive for several reasons. First, it is abundantly clear that this court did not rely on the admission of improper evidence in finding a constitutional violation in *Stephens*. The court initially did rely on the admission of improper evidence in finding such a violation, *Stephens v. Zant*, 631 F.2d at 406, but later modified the opinion to delete any reference to the introduction of improper evidence, *Stephens v. Zant*, 648 F.2d at 446, although leaving the remainder of the opinion intact. This court's express disclaimer in *Stephens* of any reliance on the introduction of improper evidence demonstrates that the majority is merely groping for a basis to distinguish *Stephens*.

Moreover, a careful reading of the Supreme Court's opinion in *Zant v. Stephens*

reveals that the Court itself makes no reference to the introduction of improper evidence. Indeed, the Court's statement of the issue before it demonstrates that the Court was not concerned with improper evidence: "Today we are asked to decide whether a reviewing court constitutionally may sustain a death sentence as long as at least one of a plurality of statutory aggravating circumstances found by the jury is valid and supported by the evidence." — U.S. at —, 102 S.Ct. at 1857.²⁵ This statement makes clear that there is no logical basis for distinguishing the issue presented to the Court in *Stephens* from the issue presented to this court today.²⁶

The majority's attempt to distinguish *Stephens* from this case on the basis whether improper evidence was admitted evinces the majority's failure to grasp the fundamental problem with both the Georgia Supreme Court's review in *Stephens* and the Florida Supreme Court's review in this case. What concerned this court and the United States Supreme Court in *Stephens*, and what should concern this court today is how can a reviewing court apply a state law rule, which is, in effect, a conclusive presumption that death is the appropriate penalty in certain situations,²⁷ to affirm a sen-

25. In *Stephens*, the jury imposed the death sentence. In this case the jury was only advisory, and the trial court imposed the sentence. This difference is not a basis for distinguishing *Stephens*, and the majority makes no attempt to state otherwise. The issue in both *Stephens* and in this case involves the function of the reviewing court. On this issue, it makes no difference whether the sentence is imposed by a judge or by a jury.

26. Although I believe that *Stephens* is indistinguishable from this case, I do not agree with Judge Kravitch's reasoning that the two cases are indistinguishable because in both cases the sentencing court considered improper evidence. Opinion of Kravitch, Circuit Judge, at 866. Judge Kravitch states, in connection with petitioner's sentencing, that "the defendant's 'admission' [of] the unlawful sale of narcotics drugs,' is irrelevant to any [proper statutory aggravating factors]." *Id.* at 866 n. 42. First, as I state in the text, I believe that neither this court nor the Supreme Court was concerned with the admission of improper evidence in *Stephens*. Second, I believe that Judge Kra-

vitch overlooks that the sentencing court in this case considered the above evidence not only in support of the improper aggravating circumstance that "defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person," Fla.Stat. § 921.141(5)(b), but also to rebut the mitigating circumstance petitioner sought to prove, that "defendant has no significant history of prior criminal activity," Fla.Stat. § 921.141(6)(a). *Ford v. State*, 374 So.2d at 500 n. 1. Therefore, this evidence was properly before the sentencing judge, despite the invalidity of the above aggravating circumstance.

27. The reason the rule amounts to a conclusive rather than a rebuttable presumption is that it is employed on review and, therefore, the defendant has no opportunity to meet the presumption. The fact that a presumption employed on review must be conclusive highlights that presumptions were meant to be used as an evidentiary tool at trial, and not on review. See Fed.R.Evid. 301.

tence when it cannot tell whether the trial sentencing court would have imposed the same sentence absent the error found on review.²⁸ It is this question which the United States Supreme Court asked the Georgia Supreme Court in *Stephens*.

By certifying the above question in *Stephens*, the Court was telling the Georgia Court that unless we misperceive that your role in capital cases is that of a pure reviewing court, the use of a conclusive presumption to affirm a death sentence when you cannot tell whether the same sentence would have been imposed absent the error you found on review, raises serious constitutional problems of arbitrary review. The Court did not, however, exclude the possibility that the Georgia Supreme Court has some resentencing power and that it, therefore, may have acted as a resentencing court. Therefore, the Court invoked the Georgia certification procedure to allow the Georgia Court to explain its sentence-review function.

The notion that an appellate court may act as a resentencing court is by no means foreign to the law, especially in capital cases. The Supreme Court has recognized that state supreme courts have the ultimate state authority to determine sentencing policy by noting, and indeed, requiring, that they ensure relative proportionality in capital sentencing. See *Proffitt v. Florida*, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976). In using this ultimate authority, conferred on it by the legislature, to promulgate state sentencing policy by establishing sentencing norms, see note 17 *supra*, the state supreme court may, in effect, act as a resentencer.

I use the following examples to illustrate the resentencing power of state supreme courts. To the extent such a court takes into account sentencing decisions occurring between the trial court's original sentence and its review of that sentence in ensuring proportionality, the court must be acting as a resentencer because it is considering sentencing standards about which the original

sentencer could not have known. In addition, a state supreme court may act as a resentencer when it reverses a sentence of death even though the record fully supports the trial court's imposition of such sentence. In doing so, the court is promulgating a new sentencing norm which is contrary to the norm the trial court applied. Finally, such a court may act as a resentencer in cases like *Ford*. In such cases, the court reimposes the death penalty in circumstances different from, and less egregious than, those on which the trial sentencer relied. The court does this by applying a sentencing norm that the trial sentencer did not need to consider. Having stated these possible examples, I need express no opinion on the constitutional limitations of this resentencing power.

The Supreme Court in *Stephens* was asking the Georgia Court, therefore, whether it affirmed *Stephens*' sentence in its capacity merely as a reviewing court or whether it used its resentencing power first to promulgate a sentencing standard controlling *Stephens*' case, and then to resentence *Stephens* to death. Without knowing which of the above was true, the Supreme Court could not decipher, as I discuss at 842-843 *infra*, *Stephens*' constitutional claim because the nature of his claim depended on what the state law premises, i.e., the rationale, for the conclusive presumption rule at issue were.

This case is identical to *Stephens* in that this court also cannot decipher petitioner's constitutional claim. Although the state law rule on which the Florida Supreme Court relied in affirming petitioner's sentence is clear, the state law premises of that rule are unclear. In *Ford v. State*, the Florida Court stated: "[E]ven though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty." 374 So.2d at 503. Despite the clarity of this conclusive presumption rule, the Florida Supreme Court, like the Georgia Supreme

28. As I discuss in the text at 843 *infra*, Justice Sundberg of the Florida Supreme Court

foresaw this problem in *Elledge v. State*, 346 So.2d 998 (Fla. 1977).

Court in *Stephens*, has never explained the rationale for this rule.²⁹ Therefore, this court must adhere to *Stephens* and invoke the Florida certification procedure to seek clarification from the Florida Supreme Court on its sentence-review function in *Ford*.³⁰

The majority appears to believe that there is no need for certification because the Florida Supreme Court has explained the rationale for its conclusive presumption in two cases cited in *Ford*: *Elledge v. State*, 346 So.2d 998 (Fla.1977), and *State v. Dixon*, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). In deciding that we need not certify the state law question at issue, the majority errs in the following respects. First, it is impossible to discern from *Elledge* and *Dixon* the rationale for the rule invoked in *Ford* that death was presumed to be the appropriate penalty because *Elledge* is largely inconsistent with *Ford*, and *Dixon* provides us with little guidance. As I discuss later, *Elledge*, *Dixon*, and *Ford* provide at least four possibilities for the rationale for the rule. Second, I believe the majority fails to understand clearly that until we can determine the state law premises for the rule in question, we cannot frame petitioner's constitutional claim. In fact, the majority does not frame petitioner's constitutional claim in explicit terms because it is not really sure what that claim is. This court accomplishes nothing in attempting to adjudicate a claim the nature of which we cannot know. The majority's decision is, therefore, a futile exercise in provisional decision making. It is provisional because the Florida Supreme Court, as the ultimate

interpreter of state law, would always be free to reject the rationale that the majority imputes to that court for the *Ford* presumption. Third, the majority fails to perceive that the rationale it discerns, out of the many possible rationales, is the one that frames petitioner's constitutional claim in the light most favorable to him. Under the majority's interpretation of the Florida Supreme Court's rationale, petitioner presents a serious constitutional claim which the majority fails to address adequately. I now discuss the majority's three failures in greater detail.

To understand the possible rationales presented by *Dixon*, *Elledge*, and *Ford* it is necessary to examine those cases. *Dixon* was a case in which the Florida Supreme Court used four consolidated cases, three of which were before the court on questions certified from circuit courts, to determine the constitutionality of certain aspects of the Florida death penalty statute. The presumption language, which the Florida Court seized on in *Ford* to state that death is presumed to be the appropriate penalty when there are some statutory aggravating circumstances and no mitigating circumstances, began in *Dixon* when the Florida Supreme Court, in the course of describing the death penalty statute, turned from discussing aggravating circumstances to discussing mitigating circumstances, and stated, by way of transition: "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances . . ." 283 So.2d at 9. This statement

29. The Florida Supreme Court has invoked the rule at issue in the following cases: *Enmund v. State*, 399 So.2d 1362, 1373 (Fla.1981); *Armstrong v. State*, 399 So.2d 953, 962-63 (Fla. 1981); *Sireci v. State*, 399 So.2d 964, 971 (Fla. 1981); *Demps v. State*, 395 So.2d 501, 506 (Fla.), cert. denied, 454 U.S. 933, 102 S.Ct. 430, 70 L.Ed.2d 239 (1981); *Brown v. State*, 381 So.2d 690, 696 (Fla.1980), cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981); *Debbert v. State*, 375 So.2d 1069, 1071 (Fla. 1979), cert. denied, 447 U.S. 912, 100 S.Ct. 3000, 64 L.Ed.2d 862 (1980); *Hargrave v. State*, 366 So.2d 1 (Fla.1978), cert. denied, 444 U.S.

919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979); *LeDuc v. State*, 365 So.2d 149, 152 (Fla.1978), cert. denied, 444 U.S. 885, 100 S.Ct. 175, 62 L.Ed.2d 114 (1979).

30. Florida Rule of Appellate Procedure 9.150(a) provides: "Upon either its own motion or that of a party, the Supreme Court of the United States or the United States Court of Appeals may certify a question of law to the Supreme Court of Florida whenever the answer is determinative of the cause and there is no controlling precedent of the Supreme Court of Florida."

was unnecessary to the court's disposition of any of the consolidated cases before it, none of which presented the question this court confronts today, and was, therefore, dicta.

The above language may be read in the context in which it was stated in one of two ways, the first of which I consider the much more likely. First, it is almost beyond question that this statement is nothing more than the Florida Court's interpretation of general legislative intent. The court was merely interpreting the language of the Florida statute providing that the judge and jury, if they have found sufficient aggravating circumstances, must determine whether mitigating circumstances outweigh aggravating circumstances. Fla.Stat. § 921.141(2)(b) & (3)(b). See note 3 *supra*. The court's statement in *Dixon* amounts probably to nothing more than an abstract reference to the legislature's intent that if the sentencer finds some aggravating circumstances, it will usually impose the death penalty, unless it also finds some mitigating circumstances to balance against the aggravating circumstances.³¹ The statement is, therefore, nothing more than the court's recognition that the legislature devised a balancing test for sentencing in capital cases. As such, and because this statement was not applied to any of the cases consolidated in *Dixon*, the court did not mean to state a rule of law to be applied in cases like *Ford*. Viewed as such, *Dixon* provides this court with no positive guidance in determining the rationale in question, and therefore, provides the majority with no basis for imputing a rationale to the Florida Supreme Court.

31. I use the word "usually" because the sentencer clearly has the discretion to impose a sentence of life imprisonment even if it finds many aggravating circumstances and no mitigating circumstances. Fla.Stat. § 921.141(2)(c) & (3).

32. I note that although petitioner introduced mitigating evidence at his sentencing trial, apparently this evidence did not rise to the level of any mitigating circumstances, statutory or otherwise, because the Florida Supreme Court, in applying its presumption rule in *Ford*, explicitly stated that there were "no mitigating factors present." 374 So.2d at 503. It is not clear to me from the sentencing court's order wheth-

A second, very remote interpretation of this statement is that the court in *Dixon* was using its supervisory power over circuit courts to send to them the following message: if you have found more than one aggravating circumstance and no mitigating circumstances, and you impose the death penalty, we will presume that you intended to impose the death penalty based on each aggravating circumstance standing alone unless you have stated otherwise in your findings of fact and conclusions of law. This second possibility amounts to the Florida Supreme Court's pronouncement of an instruction to the circuit courts that it will construe their findings and conclusions in the manner prescribed. Although the court may have meant so to instruct the circuit courts, no language in *Ford* even suggests that they were doing so. Consequently, the statement in *Dixon* is most likely a mere interpretation of general legislative intent that a balancing test be applied in capital cases. As such, *Dixon* is of little use to this court because it provides no rationale for the presumption in question.

In *Elledge* the Florida Supreme Court was faced with a case in which there were some proper aggravating circumstances, some improper aggravating circumstances, and, most important in distinguishing *Elledge* from *Ford*, some mitigating circumstances.³² In dicta, the court stated that had there been no mitigating circumstances present, "there [would have been] no danger that nonstatutory [aggravating] circumstances have served to overcome the miti-

er this was in fact the case. The sentencing court concluded: "There are no mitigating circumstances existing—either statutory or otherwise—which outweighs any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death." *Id.* at 501 n. 1. This statement is ambiguous. It may mean that no mitigating circumstances existed at all, or that those that did exist did not outweigh the aggravating circumstances present. Nevertheless, the Florida Supreme Court adopted the former interpretation, and I accept that interpretation for purposes of adjudicating petitioner's claim.

gating circumstances in the weighing process which is dictated by our statute." 346 So.2d at 1003. It is this dicta on which the majority seizes in finding the rationale for the rule invoked in *Ford* that death was presumed to be the appropriate penalty.

The majority makes the mistake of looking no further than this *Elledge* dicta. Had the majority also considered the *Elledge* holding, it would have seen that the rationale for the rule of presumption applied in *Ford* is confused to say the least. After determining that the sentencing court had found some mitigating circumstances, the *Elledge* court framed the inquiry thus:

Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which the [impermissible] factor . . . shall not be considered.

Id. (citations omitted).

The above language is a clear holding, which, as I discuss at 843 *infra*, is based on federal constitutional grounds, that when the Florida Supreme Court cannot tell from the sentencer's findings and conclusions whether it would have imposed the death sentence absent any invalid aggravating circumstance, it is "compelled to return [the] case to the trial court for a new sentencing trial." This language suggests that the Florida Supreme Court, in reviewing death sentences, acts as a pure reviewing court and does not act as a resentencing court. However, *Elledge* does not preclude the possibility that the court has some resentencing power, but that it must restrain itself from resentencing when it cannot tell whether the trial court would have imposed the death sentence absent any invalid circumstance.

Rather than using the *Ford* opinion to explain its function in reviewing capital cases, the Florida Supreme Court confused matters further by affirming petitioner's sentence with a brief statement of the rule

at issue: "[E]ven though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty" (citing *Elledge* and *Dixon*). The affirmance of petitioner's sentence, in conjunction with the *Elledge* holding, raises at least three possible rationales, in addition to those *Dixon* raises, for the court's use of the above presumption.

The first possible rationale is that the Florida Supreme Court, acting in its capacity as a reviewing court, was able to tell from the trial court's order that the trial court would have imposed the death sentence absent the invalid circumstances. This possibility is consistent with *Elledge* but it is unlikely for two reasons. First, the Florida Supreme Court, in examining the findings of fact and conclusions of law of the sentencing court, did not, and could not, point to any statement in which the court indicated what it would have done absent the invalid circumstances. It is possible that in such a situation the sentencing court would have given petitioner a life sentence. Without a statement from the sentencer about what it would have done absent the invalid circumstances, we would have to assume that the Florida Supreme Court is able to read the mind of the sentencing judge. Obviously, we cannot make this assumption. Second, the Florida Supreme Court itself has lent support to the proposition that it could not tell in *Ford* whether the sentencing court would have imposed the same sentence absent the invalid circumstances, because it relied on a presumption that death is the appropriate penalty when there are some aggravating circumstances and no mitigating circumstances. If the Florida Court was able to tell whether the sentencing court would have imposed the death sentence absent the invalid circumstances, it would have had no need to invoke any presumption. The court's presumption logically should come into play only when the court cannot tell what the sentencing court would have done absent the invalid circumstances. The first possibility I pose is, therefore, unlikely.

A second possible rationale is that the Florida Supreme Court in *Ford* could not tell whether the trial court would have imposed the same sentence, but acted in its capacity as a resentencing court, rather than merely as a reviewing court, to resentence petitioner to death.³³ This alternative is not totally inconsistent with *Elledge* if we interpret the court in *Elledge* as not precluding the possibility that it may sometimes act as a resentencing court. It is clear, however, that the court in *Ford*, by affirming the sentence rather than remanding the case for resentencing, did not show the same restraint as did the *Elledge* court, which, assuming it acted as a sentencer, felt compelled not to sentence because it could not tell whether the original sentence would have imposed the death penalty absent the invalid circumstance.

There is some language in *Ford* to support this second interpretation. The court stated: "We make the specific finding that the killing was 'especially heinous, atrocious, or cruel' under [the Florida statute]" (emphasis added). This statement implies that the court exercises some resentencing power because if it did not exercise such power, it would be irrelevant what it finds. If it was acting purely as a reviewing court, the only relevant inquiry would be what the sentencing court found. More-

over, to the extent the *Ford* court relied on the dicta in *Elledge* in affirming petitioner's sentence, it, in effect, acted as a sentencer because *Elledge* was decided after the trial court imposed petitioner's sentence and, therefore, that court could not have known about *Elledge*. Nevertheless, we still must seek clarification from the Florida Supreme Court, because the above language is not strong enough to negate a third possibility, which I read the majority opinion as embracing.³⁴

The third possible rationale is that, although the Florida Court in *Ford* could not tell whether the sentence would have imposed the death sentence absent the invalid circumstances, it acted in its capacity as a pure reviewing court, and "logically presumed the weighing process would have reached the same outcome even had the sentencing court not added to the scales those aggravating circumstances found impermissible." Majority Opinion at 815. This possibility requires this court to conclude that the Florida Supreme Court in *Ford* overruled sub silentio *Elledge*, the holding of which is based on federal constitutional grounds, as I discuss at 843 *infra*, and which holding compels the court to return for resentencing cases in which it cannot tell whether the trial court would have imposed the death sentence ab-

33. Although the supreme court's statement of its role in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981), tends to negate that it acts as a pure resentencing court, I do not believe that *Brown*, in which the court was faced with a claim totally different from the one here, see Part V *supra*, eliminates this possibility. The court may in some instances act as a resentencing court, yet still have no discretion, under state law, to consider nonrecord material in performing its resentencing function.

34. Similarly, I read Chief Judge Godbold also as embracing the third possibility. He suggests that the Florida Supreme Court in *Ford* applied a rule of "harmless error." If the Florida Court acted as a sentencer, the second possibility I have posed, it would probably not apply a rule of harmless error because the error most likely would be irrelevant, rather than harmless. The term "harmless" connotes harmless to the trial court's sentence. If the court used a harmless error rule as a sentencer in *Ford*, it would

have had to explain what relevance the trial court's original sentence had to its sentence. Because no such explanation exists, it is unlikely that the court applied a rule of harmless error as a resentencing court. The first possibility I have posed, that the court, as a reviewing court, knew what the sentence would have done is so at odds with reality, as discussed in the text at 840 *supra*, that I cannot read the chief judge's opinion as embracing it. Therefore, he must be embracing the third possibility, as does the majority. Although the Chief Judge recognizes the seriousness of the petitioner's claim as framed by the third rationale, which the majority does not, he fails, as does the majority, to recognize that the rationale he imputes to the Florida Supreme Court is only one of many possibilities and that until we can determine conclusively the proper rationale, we cannot decipher petitioner's constitutional claim, and, therefore, cannot decide this case.

sent any invalid circumstances. Although the Florida Supreme Court is free to overrule its own interpretation of the Federal Constitution, the likelihood that the court overruled sub silentio the federal constitutional holding of a case the dicta of which—that when there are some aggravating circumstances and no mitigating circumstances there is no danger that invalid aggravating circumstances have skewed the weighing process in favor of death—it cited in direct support of its holding appears unlikely. The majority fails to address this problem.

Nevertheless, for purposes of argument, I concede that the third possibility is, in fact, a valid possibility. It is arbitrary, however, for this court to choose this possible rationale out of the variety of rationales previously discussed, not to mention any other rationales that the Florida Supreme Court may explicate, especially in light of the confusion engendered by the interplay of *Dixon*, *Elledge*, and *Ford*. The majority's failure to allow the Florida Supreme Court the chance to alleviate this confusion reflects its lack of understanding of the various possible rationales for the rule in question.

Having described the majority's first major failure, that it does not perceive the numerous possible rationales for the presumption rule in question, I now turn to the majority's failure to perceive clearly that until this court knows the rationale for the presumption, we cannot frame petitioner's constitutional claim. Indeed, petitioner cannot frame his own claim at this point for his claim takes a different form depending on which of the possible rationales is the true one.

The United States Supreme Court certified the state law question in *Zant v. Stephens* because it could not frame petitioner's constitutional claim without knowing the role of the Georgia Supreme Court in reviewing death sentences. We are in the same posture in this case. For example, if

the Florida Supreme Court acted in *Ford* only as a reviewing court, petitioner's claim is that it is unconstitutional for a reviewing court arbitrarily to affirm sentence when it cannot tell whether the sentencing court would have imposed the same sentence absent the error found on review. However, if the Florida Court acted also as a resentencing court, petitioner would have to rely on a claim, for example, that the Florida Supreme Court unconstitutionally overstepped its power as a resentencing court by affirming sentence in this case. We cannot know exactly what petitioner's claim is, and therefore we obviously cannot decide this case, until we know exactly what the Florida Supreme Court did in *Ford*.

The majority's attempt to decide a claim the basis for which we cannot decipher is an exercise in total futility. In fact, the majority never describes petitioner's claim in explicit terms. At the outset, it is important to note that we are dealing with an unexhausted claim, the significance of which escapes the majority. Had petitioner properly exhausted his claim in state court, the Florida Supreme Court would have had a chance to explain the rationale for the rule in question, and this court would not now be in the position of being asked to adjudicate a claim whose form cannot be determined. Unfortunately, we must do the best we can with this claim because *Zant v. Stephens* also involved an unexhausted claim and the Supreme Court, instead of dismissing the claim for want of exhaustion, attempted to determine the merits of the claim. Reluctantly, this court must do the same.²³

The best this court can do in this case, however, is to seek clarification from the Florida Supreme Court. By rejecting petitioner's amorphous claim on the merits and denying the writ, the majority accomplishes nothing. The petitioner will merely petition the Florida Supreme Court for a writ of habeas corpus²⁴ and require the Florida

23. See note 23 *supra*.

24. At this point, a petition for a writ of habeas corpus would probably be the only way in which petitioner could present this claim di-

Supreme Court to explain its presumption rule by presenting the same constitutional challenge to that court he now presents to this court. The Florida Supreme Court will then have to address squarely the constitutionality of its challenged practice, and in doing so explain the rationale for the rule. Assuming that court holds against petitioner, he would be free to come back to federal court with a properly crystallized constitutional claim. If the state suggests that the federal courts have already rejected petitioner's claim by this court's decision today, the petitioner will assert merely that this court could not have rejected petitioner's claim, because at this point *no one knows what that claim is*. Therefore, the majority's premature attempt to rid this court of petitioner's claim will only come back to haunt this court at some future time. The circuitous path the majority takes in deciding this claim is totally at odds with the notion of finality, which notion is of utmost importance in the area of federal habeas review. We can avoid the needless litigation described above merely by asking the Florida Supreme Court directly to explain its use of the *Ford* presumption.³⁷

Finally, the majority fails to recognize that the rationale it imputes to the Florida Supreme Court, which rationale the Florida Court is free to reject, presents petitioner with his strongest constitutional claim. In fact, Justice Sundberg of the Florida Supreme Court held in favor of such a claim in *Elledge*. Under the majority's interpretation of the proper rationale, petitioner's claim is that it is unconstitutional in a capital case for a reviewing court that finds error and that cannot tell from the findings of fact and conclusions of law of the sentencing court whether that court would have imposed the death penalty absent the error, to affirm the death sentence by in-

voking an arbitrary presumption that death is the "proper" penalty when there are some statutory aggravating circumstances and no mitigating circumstances. Certainly, this claim is not to be taken lightly. I need go no further than to quote the following language of Justice Sundberg in support of the Florida Court's holding in *Elledge* that it was constitutionally "compelled" to return a case for resentencing when it could not tell what the sentencer would have done absent the invalid circumstance:

This result is dictated because, in order to satisfy the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), the sentencing authority's discretion must be "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." (Emphasis supplied) *Proffitt v. Florida*, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913.

346 So.2d at 1003. The majority is, of course, free to reject Justice Sundberg's interpretation of the Federal Constitution. I quote from Justice Sundberg only to emphasize the seriousness of petitioner's constitutional claim. The majority handles this claim in three brief paragraphs which simply do not deal with petitioner's claim.

In sum, the majority opinion is deficient in the three important respects enumerated above. First, it fails to realize that it is arbitrary for us to choose one possible rationale for the presumption in question from among the various possibilities. Second, and most important for purposes of the result in this case, it fails to recognize that because there exists numerous possible

ones. The courts should not, however, accept total blame for the quandary we are in today. The state, which is often heard to complain that federal courts are not sensitive enough to the finality of state proceedings, must share some of the blame because of its failure to raise in federal court the petitioner's failure to exhaust.

rectly to the Florida Supreme Court. A rehearing would almost certainly not be available. See Fla.R.App.P. 9.330(a) & (b).

37. As I describe at note 23 *supra*, the notion of finality would best be served if courts were careful to dismiss unexhausted claims. This case is the ultimate example of a claim the form of which no one can determine because of petitioner's failure to exhaust his state reme-

rationales for the Ford presumption, and because each rationale provides petitioner with a different constitutional claim, we cannot decide the amorphous claim with which we are now presented. Finally, the majority fails to realize that the rationale it imputes to the Florida Supreme Court provides petitioner with a serious constitutional claim, the merit of which the majority does not address.

Because the state law premises for the presumption in question are unclear, *Stephens*, which involved a similar and indistinguishable rule of presumption, compels this court to certify to the Florida Supreme Court almost the identical question the United States Supreme Court certified to the Georgia Supreme Court: "What are the premises of state law that support the conclusion that the death sentence in this case is not impaired by the invalidity of [three] of the statutory aggravating circumstances found by the [sentencing judge]?" — U.S. at —, 102 S.Ct. at 1859.

Based on the preceding analysis, I respectfully dissent from Part III of the majority opinion.

VII.

In conclusion, I adopt the decision of the panel on issues 1, 4, and 6, as those issues

1. Additionally, I have reservations that Fed.R. App.P. 42(b) can be interpreted to preclude appellant's effort to dismiss his appeal. Rule 42(b) can be interpreted as giving an appellant the right to dismiss an appeal subject only to terms properly fixed by the court or the parties. In my view, no such terms are in force here. I question whether a timeliness restriction is a term that can be "fixed by the court," particularly subsequent to the filing of the motion to dismiss. Furthermore, there is a possible Article III case or controversy problem, going to the heart of our power to issue this opinion, which is raised by appellant's effort to dismiss his appeal. See, e.g., *United States Parole Commission v. Geraghty*, 445 U.S. 388, 397, 100 S.Ct. 1202, 1209, 63 L.Ed.2d 479 (1980), quoting Monaghan, *Constitutional Adjudication: The Who and When*, 82 Yale L.J. 1363, 1384 (1973) ("requisite personal interest that must exist at the commencement of the litigation (standing) must continue throughout its existence (mootness)"). This issue deserves more thorough consideration.

are stated in this opinion, *supra* at 824. I concur in the result this court reaches on issues 2, 3, and 5. My disposition of the *Stephens* issue, issue 7, is that this court must await the resolution of a state law question by the Florida Supreme Court before ruling on petitioner's application for a writ of habeas corpus.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

I do not agree with the majority's per curiam disposition of this case. In my view it is the responsibility of this court to defer issuance of the opinion pending the Supreme Court's final disposition in *Stephens v. Zant*, 631 F.2d 397 (5th Cir.1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir. 1981), *certified to Supreme Court of Georgia*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982) and *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), *cert. granted*, — U.S. —, 103 S.Ct. 340, 74 L.Ed.2d — (1982).¹

Because, however, the majority has adopted the procedure outlined in the per curiam, I proceed to the merits of Ford's appeal.

[6-11, 16-23] Although I concur in Parts IV, VI,² and VII of the majority's opinion

1a. In Part VI, the majority addresses petitioner's claim that the Florida Supreme Court failed to apply a consistent standard of review in affirming the trial court's findings on aggravating and mitigating factors. Having reviewed petitioner's claim, I agree with the majority that the Florida Supreme Court's affirmation of these findings was consistent with its prior decisions and was not arbitrary, capricious, or otherwise in violation of petitioner's eighth amendment rights. Although I am in basic agreement with the majority's reasoning on this issue, one point needs clarification. The majority's statement that federal courts "will not undertake a case-by-case comparison of the facts in a given case with the decisions of the state supreme court," Majority Opinion, *supra* at 819 (citing *Spinkellink v. Wainwright*, 578 F.2d 582, 604 05 (5th Cir.1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979)), correctly articulates the fundamental principle that federal courts do not sit to review state courts' decisions on matters of state law. This statement should not be understood to deny the federal courts

and its conclusion in Part V.² I write separately because I disagree with the majority's resolution of the sentencing issues in Parts I, II, and III. In my view, Supreme Court and former Fifth Circuit precedents³ compel reversal on the claim that the state court considered extra-record information in reviewing petitioner's sentence and on the aggravating and mitigating circumstances claims.

authority to review state courts' application of capital sentencing criteria for compliance with federal constitutional requirements, however. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) demonstrates that such review is proper and that federal courts will reverse death sentences that—though based on proper statutory criteria—reflect an interpretation of such criteria so vague or broad as to violate the eighth amendment requirement of channelled sentencer discretion. Comparison of the case in which such federal challenge is being made to other cases in which the state court has applied the statutory criteria, albeit not conclusive, is relevant to the determination whether the criteria are being constitutionally applied. See *id.* at 429-33, 100 S.Ct. at 1765-67. The language in the *Spinkellink* opinion reflecting a contrary view is no longer valid after *Godfrey*.

2. In Part V of its opinion, the majority states three reasons for rejecting petitioner's argument that his rights under *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) were violated by the state courts' failure to require that the sentence find beyond a reasonable doubt that there were insufficient mitigating factors to outweigh the aggravating factors. I join in the majority's conclusion that petitioner's claim must be rejected for the third reason stated in the opinion: Ford's argument confuses the process of finding facts, to which the *Winship* case was addressed, with the altogether different process of weighing circumstances. The weighing process, which occurs only after the relevant facts have been found, necessarily involves subjective, normative judgments on the part of the sentencing tribunal. To apply the standard that was designed to govern the quantum of proof to the process of normative judgment simply does not make sense. For this reason only, I concur in the majority's rejection of petitioner's fifth claim.

I do not agree with the other reasons articulated by the majority for rejecting this claim, however. The first reason the majority states is that the due process standard established in *Winship* governing burden of proof in criminal

I.

Brown Issue: Florida Supreme Court's Consideration of Extra-Record Materials

Petitioner claims the Florida Supreme Court violated his constitutional rights by reviewing reports, evaluations, and other materials relevant to his character that he was unaware were being used and was afforded neither access to nor an opportunity

cases has no bearing on the sentencing phase of a capital trial. Such statement in effect decides petitioner's alternative argument—that proof of the existence of aggravating and mitigating factors must be sufficient to meet the *Winship* beyond-a-reasonable-doubt standard. As the majority notes, Majority Opinion, *supra* at 819, this latter assertion was not made before the panel and is not properly before the en banc court. For this reason, and because the extent of due process protection to which capital defendants are entitled at sentencing is an open and difficult question that should not be reached without full briefing and argument, see *Gardner v. Florida*, 430 U.S. 349, 358 & n. 9, 97 S.Ct. 1197, 1204 & n. 9, 51 L.Ed.2d 393 (1977), I would not dispose of petitioner's claim on such broad grounds. Nor do I agree with the majority's reliance on *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976), in which the Supreme Court upheld Florida's capital sentencing statute on its face, as a basis for rejecting petitioner's *Winship* claim. The Supreme Court in *Proffitt* was not asked to decide the issue raised by petitioner here, nor did it decide that issue gratuitously. It held only that the statutory aggravating and mitigating factors, as related in the trial court's instructions in that case, were sufficiently narrow and well-defined to overcome the problems of arbitrary and unguided sentencing identified in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). An approach to constitutional decisionmaking that construes the Supreme Court's approval of a statute on certain constitutional grounds as validating the enactment against any other constitutional challenge, though an easy method of avoiding difficult questions, in my view constitutes a serious abdication of judicial responsibility. Hence, I do not join in that part of the majority's reasoning.

3. This court is bound by prior decisions of the former Fifth and Eleventh Circuits unless the en banc court expressly overrules them. *Bonner v. City of Prichard*, 661 F.2d 1206 (11th Cir.1981) (en banc).

to rebut. Petitioner initially raised this claim with 122 other capital defendants in a habeas action in the Florida Supreme Court. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). The Florida court accepted arguendo the "petitioners' most serious charges," *id.* at 1331, but held that as a matter of law petitioners were not entitled to relief, *id.* at 1331-33. Its reasoning in rejecting the claim was twofold. First, it declared that extra-record materials are "irrelevant" to, and "play no part in," its review of capital sentences. *Id.* at 1331, 1332. Second, it held that the rule in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), on which petitioners relied was inapplicable to situations where extra-record information was considered only at the review stage and not during the initial sentencing proceeding. *Id.* at 1331-33.

A. Was the Challenged Practice Constitutional?

The state adopts the Florida Supreme Court's argument that *Gardner*, which reversed a death sentence imposed by a trial judge after reviewing nonrecord evidence, is inapplicable to an appellate tribunal's review of nonrecord materials. The majority—although ultimately declining to decide the merits of petitioner's *Gardner* claim—alludes to the above argument in an attempt to trivialize petitioner's constitutional claim.⁴ The principles the Supreme Court articulated in *Gardner*, however, which are at the core of its recent constitu-

tional precedents on capital sentencing, condemn with equal force the review of non-record information by appellate and trial courts.

1. Constitutional Underpinnings of Gardner

Despite a long jurisprudential tradition of relaxed procedural requirements and largely discretionary decisionmaking at the sentencing stage, see, e.g., *United States v. Tucker*, 404 U.S. 443, 92 S.Ct. 589, 30 L.Ed.2d 592 (1972); *McGautha v. Maryland*, 402 U.S. 183, 91 S.Ct. 1454, 28 L.Ed.2d 711 (1971); *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949); see generally Note, *The Constitutionality of Statutes Permitting Increased Sentences for Habitual or Dangerous Criminals*, 89 Harv.L.Rev. 356, 359-73 (1975), the last decade has seen substantial change in the constitutional law governing sentencing in capital cases. In *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) several members of the Supreme Court first articulated the view, now espoused by a majority of the Court,⁵ that the significance of the sentencing process and its effect on the defendant are greater in cases involving the death penalty, which "differs from all other forms of criminal punishment, not in degree but in kind." *Id.* at 306, 92 S.Ct. at 2760 (Stewart, J., concurring). See *id.* at 286-91, 92 S.Ct. at 2750-53 (Brennan, J., concurring); *id.* at 314-71, 92 S.Ct. at 2764-93 (Marshall, J., concurring). *Furman* thus held that imposition of the death penalty violates the eighth amendment where the

4. The argument that *Gardner* is inapplicable originated in the Florida Supreme Court. *Brown v. Wainwright*, 392 So.2d at 1331-33, and was adopted *in toto* by the panel majority. *Ford v. Strickland*, 676 F.2d at 444. The en banc majority refers to it approvingly. See Majority Opinion, *supra* at 810 & n. 2 (emphasizing *Gardner*'s holding that "death sentence may not be imposed . . . on nonrecord, unchallengeable information" and noting that determination whether use of nonrecord information in this case was unconstitutional "[t]o some extent . . . turns on whether the Florida Supreme Court is 'imposing' sentence or doing something qualitatively different. See *Brown v. Wainwright*, 392 So.2d at 1331").

5. See *Gardner v. Florida*, 430 U.S. at 357, 97 S.Ct. at 1204 (citing various concurring and dissenting opinions in *Gregg v. Georgia*, 429 U.S. 153, 96 S.Ct. 2969, 49 L.Ed.2d 859 (1976) and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)). See also *Eddings v. Oklahoma*, 455 U.S. 104, 118, 102 S.Ct. 869, 878, 71 L.Ed.2d 1, 13 (1982) (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964 (Burger, C.J., joined by Stewart, Powell, and Stevens, JJ.) ("qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed").

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process by which it is imposed is standardless and arbitrary. *Furman's* 1976 progeny⁶ reaffirmed this principle, emphasizing that capital sentencing procedures must not create "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. 153, 188, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 207, 220-22, 96 S.Ct. at 2941, 2947-48 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Jurek v. Texas*, 428 U.S. 262, 274, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 277, 279, 96 S.Ct. at 2958, 2959 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Proffitt v. Florida*, 428 U.S. 242, 252-53, 258, 96 S.Ct. 2960, 2966-67, 2969, 49 L.Ed.2d 913 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 260-61, 96 S.Ct. at 2970 (White & Rehnquist, JJ. & Burger, C.J., concurring). In these cases a majority of the Court held that sentence discretion in capital cases must be "directed and limited" to provide consistent and rational imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. at 189, 96 S.Ct. at 2932-33 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 220-22, 96 S.Ct. at 2947 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Proffitt v. Florida*, 428 U.S. at 255-58, 96 S.Ct. at 2968-69 (opinion of Powell, Stewart & Stevens, JJ.); *id.* 260-61, 96 S.Ct. at 2970 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Jurek v. Texas*, 428 U.S. at 270-74, 276, 96 S.Ct. at 2955-57, 2958 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 279, 96 S.Ct. at 2959-60 (White & Rehnquist, JJ. & Burger, C.J., concurring), and to ensure "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (opinion of Powell, Stewart & Stevens, JJ.); see also *Gardner v. Florida*, 430 U.S. 349, 359, 97 S.Ct. 1197, 1205, 51 L.Ed.2d

393 (plurality opinion); *id.* at 362, 363-64, 97 S.Ct. at 1206, 1207-08 (White, J., concurring).

The Court's most recent capital sentencing decisions have continued to focus on minimizing the risk of arbitrary decision-making. See, e.g., *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 874-875, 71 L.Ed.2d 1, 8-9 (1982); *id.* at 118, 102 S.Ct. at 878, 71 L.Ed.2d at 13 (O'Connor, J., concurring); *Godfrey v. Georgia*, 446 U.S. 420, 427-28, 100 S.Ct. 1759, 1764-65, 64 L.Ed.2d 398 (1980) (plurality opinion); *id.* at 433, 438-42, 100 S.Ct. at 1767, 1769-72 (Marshall & Brennan, JJ., concurring); *Lockett v. Ohio*, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) (plurality opinion); *Gardner v. Florida*, 430 U.S. at 358, 97 S.Ct. at 1204-05; *id.* at 363-64, 97 S.Ct. at 1207-08 (White, J., concurring). Whereas earlier cases focused on the quantity of information before the sentencing tribunal, e.g., *Williams v. New York*, 337 U.S. at 247, 69 S.Ct. at 1083, recently the Court has shown greater concern for the quality of such information. *Gardner v. Florida*, 430 U.S. at 359, 97 S.Ct. at 1205; *id.* at 363-64, 97 S.Ct. at 1207-08 (White, J., concurring). The Court has recognized the defendant's interest both in presenting evidence in his favor, *Eddings v. Oklahoma*, *supra* (plurality opinion); *Lockett v. Ohio*, *supra* (plurality opinion); *id.* at 620-21, 98 S.Ct. at 2972-73 (opinion of Marshall, J.), and in being afforded the opportunity to explain or rebut evidence offered against him, *Gardner v. Florida*, 430 U.S. at 362, 97 S.Ct. at 1206-07; *id.* at 363-64, 97 S.Ct. at 1207-08 (White, J., concurring). Reliability in the factfinding aspect of sentencing is the cornerstone of the Court's decisions. See, e.g., *Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964 (plurality opinion); *Gardner v. Florida*, 430 U.S. at 359-60, 362, 97 S.Ct. at 1205; *id.* at 363-64, 97

6. In 1976 the Court considered constitutional challenges to five states' post-*Furman* capital sentencing statutes. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S.

262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

S.Ct. at 1207-08 (White, J., concurring); *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2991 (opinion of Powell, Stewart & Stevens, JJ.).

2. *Gardner*

In *Gardner*, the Court reversed a death sentence imposed on the basis of material not disclosed to the defendant,⁷ holding that procedure unconstitutional under the eighth amendment and the due process clause.⁸ The plurality rejected the state's asserted justifications for allowing imposition of the death penalty on the basis of confidential information, reasoning that the risk that such information "may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest," and "the interest in reliability [in capital sentencing] plainly outweighs the State's interest in preserving the availability of [such] information." *Id.* at 359, 97 S.Ct. at 1205.

3. *Application of Gardner*

The state's argument that the Constitution does not prohibit consideration of non-record information at the appellate level

must proceed from one or both of the following premises: that rational appellate review is not an essential component of capital sentencing procedures under the eighth amendment, or that use of nonrecord information without notice to the defendant will not undermine the reliability of appellate review in the same way *Gardner* recognized it would affect the reliability of initial sentencing. Either premise is erroneous.

A meaningful appellate review process is one of the two fundamental requirements of capital sentencing procedures established by the Supreme Court's 1976 death penalty decisions.⁹ See *Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990 (plurality opinion); *Roberts v. Louisiana*, 428 U.S. at 335 & n.11, 96 S.Ct. at 3007 & n.11 (plurality opinion). Indeed, the Court relied on the appellate review provision in upholding the Florida statute under which petitioner was sentenced, viewing it as one of the means by which the statute assured that the death penalty would not be imposed on the basis of passion, prejudice, or any other arbitrary factor. *Proffitt v. Florida*, 428 U.S. at 250-53, 258-59, 96 S.Ct. at 2965-67, 2969-70 (opinion of Powell, Stewart & Stevens, JJ.). Accord *Gregg v. Georgia*,

7. In *Gardner*, the trial judge had ordered a presentence investigation after the jury had returned an advisory verdict recommending a life sentence. The judge had then disclosed part, but not all, of the presentence investigation report to the defendant's counsel and, apparently on the basis of the report, had rejected the jury's advisory verdict and sentenced the defendant to death. *Gardner v. Florida*, 430 U.S. at 352-53, 97 S.Ct. at 1201-02.

8. The plurality opinion in *Gardner* expressly held that the sentencing procedure at issue violated the due process clause of the fourteenth amendment. *Gardner v. Florida*, 430 U.S. at 351, 358, 97 S.Ct. at 1201, 1204. The opinion's emphasis on the difference in kind between the death penalty and other punishments, *id.* at 357-58, 97 S.Ct. at 1204-05, rejection of some arguments that it conceded might have merit in noncapital cases, *id.* at 360, 97 S.Ct. at 1205-06, and heavy reliance on *Furman* and other death penalty decisions, *id.* at 360-61, 97 S.Ct. at 1205-06, however, indicate that the plurality's reasoning involved a cross-section of eighth amendment and due process concerns. Justice White's concurring opinion expressed the view that the procedure at issue clearly violated the eighth amendment and thus

that there was no need to address the due process issue. *Id.* at 362-64, 97 S.Ct. at 1207 (White, J., concurring). Justice Blackmun concurred in the judgment on the basis of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976)—decisions based on the eighth amendment. *Gardner v. Florida*, 430 U.S. at 364, 97 S.Ct. at 1207 (Blackmun, J., concurring). Justice Brennan agreed with the plurality that the procedure at issue violated the due process clause but adhered to his prior opinions stating that the death penalty violates the eighth amendment in all circumstances. *Id.* at 364-65, 97 S.Ct. at 1207-08 (Brennan, J., concurring).

9. The other requirement established in the 1976 cases, having been preordained by *Furman*, was the provision of standards and procedures to limit and direct sentencer discretion. *E.g.*, *Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990; *Gregg v. Georgia*, 428 U.S. at 196-98, 199, 206-07, 96 S.Ct. at 2936, 2937, 2940-41; *Proffitt v. Florida*, 428 U.S. at 253, 258, 96 S.Ct. at 2967, 2969.

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gia, 428 U.S. at 204-06, 96 S.Ct. at 2939-40 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 211-12, 96 S.Ct. at 2942-43 (White & Rehnquist, JJ. & Burger, C.J., concurring) (Georgia statute's appellate review provision ensures that death penalty will not be imposed capriciously). *Cf. Gardner v. Florida*, 430 U.S. at 360-61, 97 S.Ct. at 1205-06; *id.* at 363-64, 97 S.Ct. at 1207-08 (White, J., concurring) (trial judge's failure to make available to appellate court information he considered in imposing sentence renders sentencing procedure invalid). The careful consideration given by the Supreme Court to the adequacy of the Florida statute's appellate review procedure belies any suggestion that the Court did not consider appellate review integral to capital sentencing. See *Proffitt v. Florida*, 428 U.S. at 258-59, 96 S.Ct. at 2969-70.

Second, an appellate court's reliance on nonrecord information, without providing notice to the defendant of the substance of that information or an opportunity to contest its accuracy, risks arbitrary imposition of death such as was condemned in *Furman*. The state insists that there is no such risk involved here because the appellate court merely reviewed, and did not "impose," petitioner's sentence. If in deciding to affirm petitioner's sentence the Florida court reviewed and relied on undisclosed, and possibly inaccurate, information concerning petitioner's character and prison record, however, that court's disregard for the interests of petitioner and society in ensuring that death sentences are predicated on reliable factfinding is no less egregious than the similar actions of the trial judge who imposed the sentence invalidated in *Gardner*.

10. As noted above, the Florida Supreme Court in deciding the *Brown* issue assumed arguendo that the petitioners' factual allegations were true. In the district court, petitioner proffered evidence indicating that at the time of his appeal to the Florida Supreme Court that court was engaged in the regular practice of soliciting, receiving, and reviewing extra-record materials of this type—without notifying the parties involved—in connection with its review of capital sentences. Petitioner alleged that much of this material, along with the court's letters requesting it in particular cases, was purged from the court's files, rendering verification

In both situations the "[a]ssurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip"; in both the absence of defense counsel's participation precludes the adversarial debate our system recognizes as "essential to the truthseeking function." See *Gardner v. Florida*, 430 U.S. at 359, 360, 97 S.Ct. at 1205, 1206.

Because the procedure here challenged poses the risk that death sentences may be affirmed on the basis of inaccurate information and because meaningful appellate review that minimizes rather than enhances such risk is constitutionally mandated in capital cases, I cannot conclude, as the majority seems to, that no significant constitutional problem is raised by petitioner's claim.

B. Did the Florida Supreme Court Engage in the Practice of Which Petitioner Complains

Two allegations form the basis of Ford's *Gardner* claim: (1) that the Florida Supreme Court received nonrecord information about petitioner and other capital defendants; and (2) that the court considered that information in deciding to affirm petitioner's death sentence. Neither the state court nor the district court has resolved these factual contentions.¹⁰ The majority, following the pattern of the *Brown* court, "assume[s] without deciding" the truth of the first allegation. It ultimately skirts the merits of the claim, however, in essence by finding that the Florida court did not consider nonrecord information in affirming

that the practice was engaged in in particular cases very difficult. He offered proof that materials of the type routinely solicited by the Florida Supreme Court were contained in his prison files, however, and sought discovery to obtain evidence that the state court had requested nonrecord information in his case. The district court refused to admit the evidence petitioner proffered and denied his request for discovery. It then rejected his claim on the merits because of the absence of direct evidence that the Florida court had viewed any nonrecord information in reviewing Ford's sentence.

petitioner's sentence. In lieu of evidence to support this finding, it relies on statements in the *Brown* opinion and invokes a "presumption of regularity." These factors simply do not substantiate the majority's finding. Its approach can only be characterized as an attempt to evade the difficult questions presented by petitioner's claim. In rendering its finding, the majority relies on three subsidiary "facts": (1) that Florida law does not permit the state supreme court to rely on nonrecord material in affirming capital sentences; (2) that the Florida court would not have relied on such information in contravention of state law; and (3) that the Florida court's reading of nonrecord information would not have affected its decisions because the court would have disregarded that material. The following section examines these premises to determine whether they support the majority's conclusion.

The majority interprets the Florida Supreme Court's decision in *Brown v. Wainwright*, *supra*, to hold that state law prohibits reliance by the supreme court on nonrecord information in affirming capital sentences. It cites language in the *Brown* opinion stating that such material is "irrelevant [] to [its] appellate function in capital cases" and "play[s] no part in [its] sentence review role." Majority Opinion, *supra* at 810 (quoting *Brown v. Wainwright*, 392 So.2d at 1331, 1332). Without examining the analysis underlying the Florida court's conclusion, the majority accepts these remarks as determinative of the matter, which it characterizes as concerned solely with state law. Although federal courts are bound by decisions of the highest state court in deciding issues of state law, the majority's adoption of the *Brown* court's reasoning raises issues of federal as well as state law. The Florida court's analysis of its role in capital sentence review conflicts with the interpretation of the state's sentencing statute rendered by the United States Supreme Court in upholding the

statute against constitutional challenge. When state law, as interpreted by the state courts, runs head on with principles of federal constitutional law, our foremost responsibility is to the latter.

In *Brown*, the Florida court concluded that nonrecord information is "irrelevant" to its decisions by reasoning that its function in reviewing capital sentences is very limited. The court disclaimed performing any evidentiary review function in capital cases.¹¹ This characterization of the appellate court's role contradicts the Supreme Court's interpretation of Florida's capital sentencing statute in *Proffitt v. Florida*, *supra*, as requiring the state supreme court to "review[] and reweigh[]" the evidence and "determine independently whether the imposition of the ultimate penalty is warranted." *Proffitt v. Florida*, 428 U.S. at 253, 96 S.Ct. at 2967 (citing *Songer v. State*, 322 So.2d 481, 484 (Fla.1975); *Sullivan v. State*, 303 So.2d 632, 637 (Fla.1974)). To be sure, it is fully within the Florida Supreme Court's authority, as the ultimate arbiter of state law, to reject the United States Supreme Court's interpretation of state law and adopt the view it espouses in *Brown*. In reinterpreting its review function in capital cases to be substantially different from that the state presented and the United States Supreme Court adopted in *Proffitt*, however, the state court calls into question the continued vitality of the *Proffitt* holding that capital sentencing as administered under the Florida system meets the requirements of the eighth amendment. *Cf. Gardner v. Florida*, 430 U.S. 349, 365-70, 97 S.Ct. 1197, 1208-10, 51 L.Ed.2d 393 (1977) (Marshall J., dissenting) (cursory review by Florida Supreme Court undercuts basis for approval of Florida system in *Proffitt*). Although the *Brown* court's interpretation of its role in reviewing sentences is determinative of that question, if such interpretation was operative at the time of petitioner's direct appeal I would hold that his

11. The court described its role as limited merely to "determin[ing] if the jury and judge acted with procedural rectitude" and "compar[ing] the case under review with all past capital

cases to determine whether or not the punishment is too great." *Brown v. Wainwright*, 392 So.2d at 1331-33.

sentence is invalid because he was not accorded the "meaningful appellate review" to which he is entitled under *Proffitt v. Florida*, 428 U.S. at 251, 96 S.Ct. at 2966. Accord *Gregg v. Georgia*, 428 U.S. at 204-06, 96 S.Ct. at 2939-40 (Georgia statute's appellate review provision ensures imposition of death penalty will not be capricious).

The majority's reading of the *Brown* decision as proscribing the use of nonrecord materials in sentence review is undermined by the *Brown* court's emphasis on distinguishing this case from *Gardner v. Florida*, *supra*. The *Brown* court devoted a substantial portion of its opinion to the argument that *Gardner* "presents no impediment" to consideration of nonrecord information at the appellate review, rather than sentence imposition, stage. See *Brown v. Wainwright*, 392 So.2d at 1333.¹² The opinion thus indicates that the Florida courts found no federal constitutional deficiency in the process of reviewing nonrecord information at the appellate stage. Moreover, it implies that the court found no state law barrier to such procedure either because, had it held, that state law prevented it from considering nonrecord information, it would have had no reason to decide that such procedure was unobjectionable under federal law. In short, the tenor of the *Brown* opinion suggests the Florida court discerned no defect in the challenged procedure under either state or federal law and that this was the primary basis for its rejection of the petitioner's claim.

The majority concludes, however, that *Brown* holds Florida law precludes the state

supreme court from using nonrecord information in reviewing capital cases. The majority next addresses whether the state court may have used nonrecord information despite this proscription. Answering this query in the negative, the majority relies on (1) what it interprets as an affirmative statement by the *Brown* court that nonrecord information was not used in reviewing capital sentences; and (2) a presumption of regularity in the state court proceedings. In addition, the majority justifies its decision on the ground that probing further into the matter would require questioning of the Florida Supreme Court justices concerning their mental processes, which procedure is abhorrent in our judicial system.

I disagree with the majority's view of the *Brown* opinion as unequivocally denying the use of nonrecord information. The Florida court did not deny that it systematically requested and received nonrecord information concerning capital defendants, see *Brown v. Wainwright*, 392 So.2d at 1330-31; indeed it expressly stated that it did obtain such information, *id.* at 1333 n.17. Moreover, the *Brown* court did not specifically disclaim having used the nonrecord information it admittedly obtained; it said only that such information is "irrelevant" to its decisionmaking in view of the narrow functions it performs in reviewing sentences. Even accepting the limited role the Florida court defined for itself in *Brown*, it is not inconceivable that in performing that role the court might have taken into consideration nonrecord information that it had before it.¹³ The court itself conceded as

12. The Florida court did not find it possible to believe that in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay out for inspection by the appellant, even in a capital case, all of the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence.

Brown v. Wainwright, 392 So.2d at 1332 (quoting *Ex Parte Farley*, 570 S.W.2d 617, 625-27 (Ky.1978)).

13. See *Brown v. Wainwright*, 454 U.S. 1000, 1002-03, 102 S.Ct. 642, 644, 70 L.Ed.2d 407,

409 (1981) (Marshall, J., dissenting from denial of certiorari).

When reviewing a sentence for procedural regularity, the court might uphold or vacate the sentence in part on grounds not considered by the trial court, or on factually erroneous grounds, because it has viewed ex parte unreliable, nonrecord information concerning the appellant. And when reviewing sentences for proportionality, the court's comparison of the sentences of other capital defendants with that of the appellant is rendered meaningless if the court has upheld or vacated the death sentences of other individuals after viewing this kind of information, or if the court used possibly erroneous informa-

much by stating that "[t]he 'tainted' information we are charged with reviewing was . . . in every instance obtained to deal with newly-articulated procedural standards." *Id.* (emphasis added).

As a second basis for concluding the Florida court did not consider nonrecord information, the majority states that federal courts must accord a "presumption of regularity" to the state court proceedings—that is, presume that "the state supreme court follows its own law and procedures." Majority Opinion, *supra* at 811. As support for this proposition, the majority cites the federal habeas corpus statute, 28 U.S.C. § 2254(d), and *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)—a decision interpreting that provision. I agree that there are circumstances in which it is appropriate for federal courts to engage in such a presumption of regularity with respect to state court decisions, but in my view this case does not present such circumstances. First, the authorities cited by the majority are inapposite.¹⁴ Second, the Florida court did not acknowledge that the practice of soliciting and reviewing nonrecord information is legally objectionable. It distinguished *Gardner* as inapplicable to appellate decisionmaking, remarked that petitioners' constitutional claims were "unpersuasive," *Brown v. Wainwright*, 392 So.2d at 1331, and throughout the opinion maintained the position that appellate consideration of nonrecord material would not violate petitioners' rights. The majority presumes that the Florida court did not engage in such practice because in its view to do otherwise would offend the Florida court. Under the Florida court's own interpretation of the governing legal principles,

tion only as background data for its proportionality determination. The more systematic the practice of reviewing such information, the greater the danger of this second form of distortion.

14. Section 2254(d) requires federal courts addressing collateral attacks on state court judgments to defer to determinations of fact made by a state court "after a hearing on the merits of the factual issue." The *Brown* court neither received evidence nor held a hearing; instead, it decided the case on the basis of the petitioners' allegations. The Florida court thus ren-

however, there is no impropriety in examining nonrecord information. See text *supra* at 850-851. Principles of federalism and comity are not violated by inquiring whether a state court has followed a procedure that it has declared to be legally sound.

As a final rationalization for the presumption in which it engages, the majority flashes the spectre of calling the state supreme court justices to the witness stand to testify about their mental processes. There is no question that such procedure, though it may be the only means of obtaining direct evidence to support petitioner's allegations, is barred by prior precedents. See *Fayerweather v. Ritch*, 195 U.S. 276, 25 S.Ct. 58, 49 L.Ed. 193 (1904); *United States v. Crouch*, 566 F.2d 1311 (5th Cir.1978). I agree that it would be impermissible to conduct this type of factual inquiry; I disagree with the majority that we should uphold the Florida Supreme Court's practice because of a lack of direct evidence. First, because such evidence is wholly within the state's control, fairness requires that the state rather than petitioner should suffer the adverse consequences of its absence. *Cf. Jencks v. United States*, 353 U.S. 657, 670-71, 77 S.Ct. 1007, 1014-15, 1 L.Ed.2d 1103 (1957) (government has duty to insure justice is done and thus may invoke evidentiary privileges to suppress evidence in its possession only at price of release of defendant). Second, although we cannot ask the Florida justices directly whether and for what purpose they may have used nonrecord information in reviewing Ford's sentence, we are not faced with a record that is utterly silent on this question.¹⁵ Petitioner

dered no factual finding to which the presumption of correctness under § 2254 applies. Nor does anything in the *Sumner* decision suggest that § 2254 is broader in scope than its terms or encompasses aspects of state court decision other than factual determinations made on the basis of evidence.

15. Compare this case with *Harris v. Rivera*, 454 U.S. 339, 102 S.Ct. 460, 70 L.Ed.2d 530 (1981) (mere inconsistency in verdicts insufficient basis for inferring that judge relied on impermissible evidence or nonrecord information).

proffered circumstantial evidence that the Florida court solicited and received nonrecord evidence in connection with its review of his sentence. See note 10 *supra*. In its opinion in *Brown*, the Florida court admitted requesting and receiving such material in some cases. The court did not specifically deny that it considered this information for some purpose, and the logical implication of its comment that it obtained nonrecord material in order to comply with "newly-articulated procedural standards" is that it also used the material for that purpose. Although the Florida court's opinion is ambiguous, it raises sufficient indicia that the court considered nonrecord material in reviewing capital sentences to negate any presumption to the contrary. Moreover, the material proffered by petitioner, which the district court should have admitted, together with the *Brown* opinion, in my view is sufficient to raise a contrary presumption: that petitioner's rights under *Gardner* were violated. Hence, only if the state can demonstrate that nonrecord information was not requested, received, or used by the state court in connection with Ford's case should relief be denied. Otherwise petitioner is entitled to a new appellate review of his sentence by the Florida Supreme Court with full disclosure of the materials it will consider.

II.

Unconstitutional Limitation of Mitigating Circumstances

A. Waiver

Ford contends the trial court's instructions to the jury on aggravating and miti-

gating factors violated his right under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2554, 57 L.Ed.2d 973 (1978), to have the sentencer consider nonstatutory mitigating evidence concerning his character and the circumstances of his offense. The majority rejects this challenge purportedly on the ground that petitioner committed procedural default by failing to object to the instructions at trial and on direct appeal and because he has not established prejudice—the second component of the waiver exception recognized in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). In reaching this conclusion, the majority confuses the issue of prejudice with the determination whether the challenged instruction was erroneous and hence decides both the procedural issue and the merits of appellant's claim. I disagree with the majority's analysis and resolution of both the waiver and substantive issues. Before discussing my disagreements with the majority, however, I will briefly state the bases for my conclusion that petitioner has established cause for his procedural default, which is the first required element of the *Sykes* exception to waiver.

1. Cause

In *Sykes*, the Supreme Court adopted the "cause and prejudice" exception to the waiver rule¹⁶ but left for later cases the task of more specifically defining that standard. *Wainwright v. Sykes*, 433 U.S. at 90-91, 97 S.Ct. at 2508-09.¹⁷ In the recent decision of *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982), the Court resumed the analysis left incomplete in *Sykes* and gave more "precise content"

case to state that the standard is a generally applicable limitation on federal habeas review where defendants fail to comply with states' contemporaneous objection rules.

16. The cause and prejudice standard was first enunciated in *Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973), in which it was applied to bar a challenge to the makeup of a federal grand jury asserted for the first time on collateral attack. In *Francis v. Henderson*, 425 U.S. 536, 98 S.Ct. 1708, 48 L.Ed.2d 149 (1976), the Supreme Court extended the cause and prejudice standard to bar a similar challenge to a state's grand jury composition. *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), which applied the standard in a case challenging admission of inculpatory statements, was the first

17. In *Sykes* the respondent had "advanced no explanation whatever for his failure to object at trial" thus precluding a finding of cause, and the Court found that evidence at respondent's trial other than the allegedly unconstitutional evidence "negate[d] any possibility of actual prejudice." *Wainwright v. Sykes*, 433 U.S. at 91, 97 S.Ct. at 2509.

to the term "cause." In *Engle*, the Court addressed an assertion of "cause" similar to that raised by Ford. The defendants in *Engle*, challenging jury instructions as impermissibly shifting the burden of proof, asserted as "cause" for their failure to object to the instructions at trial that certain cases addressing the constitutionality of burden-shifting instructions had not been decided until after their trials and that therefore they could not have known at the time of trial that their constitutional rights were being violated. The Court did "not decide whether the novelty of a constitutional claim ever establishes cause for a failure to object."¹⁸ It rejected the defendants' argument, however, because although some of the Court's relevant cases had post-dated defendants' trials, the decision in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), which "laid the basis for their constitutional claim," had preceded all of their trials by at least four and one-half years. In the years between *Winship* and defendants' trials, many defendants had relied on that case to challenge burden-of-proof rules, and numerous courts had upheld such claims. The Court concluded that in light of this substantial post-*Winship* litigation, "we cannot say that respondents

lacked the tools to construct their constitutional claim." *Engle v. Isaac*, — U.S. — at —, 102 S.Ct. at 1574, 71 L.Ed.2d at 804.

Ford argues his failure to challenge the mitigating circumstances instruction at this sentencing hearing is justified by "cause" under *Sykes*. He bases this argument on the fact that the *Lockett* decision on which his constitutional challenge is founded was not decided until four years after his trial.¹⁹ Under the analysis developed in *Engle* we must consider whether, even in the absence of the specific holding of *Lockett* entitling capital defendants to sentencer consideration of nonstatutory mitigating evidence, there were sufficient precedential tools available at the time of petitioner's trial on which he reasonably could have constructed his eighth amendment claim.

At the district court habeas hearing, the state urged that petitioner had committed procedural default by failing to object to the instructions at trial or to raise the issue on direct appeal. The district judge, although stating *Wainwright v. Sykes* controlled, without further elaboration proceeded to rule on the merits of the claim. This can be interpreted as an implicit find-

18. Prior to the Supreme Court decision in *Engle*, two circuits had addressed whether unforeseeability of a change in constitutional law occurring after trial may constitute cause under *Sykes*. In *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir.) (en banc), cert. denied, 449 U.S. 1004, 101 S.Ct. 345, 66 L.Ed.2d 301 (1980), the Fourth Circuit held that a change in the constitutional law governing burden of proof did not constitute cause under *Sykes* for failure to raise a constitutional objection to burden-of-proof instructions in accordance with state procedural requirements. In *Isaac v. Engle*, 646 F.2d 1129 (6th Cir.1980) (en banc), rev'd, — U.S. —, 102 S.Ct. 1558, 71 L.Ed. 783 (1982), the Sixth Circuit reached the opposite conclusion. The only former Fifth Circuit case addressing whether a change in law constitutes cause is *Dumont v. Estelle*, 513 F.2d 793 (5th Cir.1975). (Although *Dumont* preceded the Supreme Court decision in *Sykes*, it applied the waiver standard on the basis of *Davis v. United States*, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216 (1973). See note 17 *supra*.) *Dumont* held that unawareness of constitutional precedent supporting an assertion of error is not cause for failure to raise such error in the state courts where the defendant seeks through his collateral

challenge to establish the doctrine vindicating the constitutional right he claims. *Dumont* did not "present an appropriate context for determining the circumstances, if any, under which the supervening declaration of a right not previously known to exist might warrant relief from a [] procedural waiver . . ." *Dumont v. Estelle*, 513 F.2d at 800.

The Supreme Court, in reversing the *Engle* decision, did not resolve when unforeseeability of a post-trial constitutional development is sufficient cause to justify a procedural default because it found the development at issue was foreseeable. See *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1572-73, 71 L.Ed.2d at 802-04. The Court noted, however, that it "might hesitate to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim." *Id.* — U.S. at —, 102 S.Ct. at 1572, 71 L.Ed.2d at 802.

19. Appellant's trial took place in December 1974. The Supreme Court decided *Lockett* in December 1978.

ing that the cause and prejudice standard was satisfied.^{19a}

The constitutional status of the death penalty has undergone substantial evolution in the last decade, beginning with *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *Furman* signaled an important change in the law governing sentencing in capital cases.²⁰ In *Furman*, a majority of the Court reversed a death sentence imposed under a discretionary sentencing statute that provided no standards for determining whether a defendant would be sentenced to life imprisonment or death. The five members of the *Furman* majority issued separate opinions all concurring in the per curiam holding but each stating different reasoning. As noted subsequently by Chief Justice Burger in *Lockett v. Ohio*, 438 U.S. 586, 599-600, 98 S.Ct. 2954, 2961-62, 57 L.Ed.2d 973 (1978):

Predictably, the variety of opinions supporting the judgment in *Furman* engendered confusion as to what was required in order to impose the death penalty in accord with the Eighth Amendment. Some States responded to what was thought to be the command of *Furman* by adopting mandatory death penalties for a limited category of specific crimes thus eliminating all discretion from the sentencing process in capital cases. Other States attempted to continue the practice of individually assessing the culpability of each individual defendant convicted of a capital offense and, at the same

time, to comply with *Furman*, by providing standards to guide the sentencing decision.

In a series of cases decided in 1976 the Supreme Court substantially clarified *Furman*. Addressing the constitutionality of five states' post-*Furman* capital-sentencing statutes, the Court upheld those statutes that provided for individualized sentencing but channelled sentencer discretion by means of legislatively defined sentencing criteria, see *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 260-61, 96 S.Ct. at 2970 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 230-22, 96 S.Ct. at 2947-48 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976) (opinion of Powell, Stewart & Stevens, JJ., concurring); *id.* at 279, 96 S.Ct. at 2959 (White & Rehnquist, JJ. & Burger, C.J., concurring), and invalidated those that eliminated sentencer discretion entirely by making the death penalty mandatory in certain classes of cases, see *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Although the opinions in *Furman* had focused on limiting the discretion of judges and jurors deciding whether to impose the death penalty, see *Furman v. Georgia*, 408 U.S. at 248-49 & n.

the petitioner's claim raised in the habeas petition under the general heading "E. Sentencing Phase Instructions to the Jury: Permitting the Arbitrary, Unguided Imposition of the Death Penalty," I construe his rejection on the merits as applying to all aspects of the claim, including the *Lockett* claim. See Record Excerpts 113-18.

19a. In his separate concurrence and dissent Judge Tjoflat states that because "[p]etitioner never introduced any evidence, other than the record of the state court prosecution, to prove cause before the district court . . . it cannot be seriously contended that the trial court erred in holding that Sykes bars petitioner's claim." (Tjoflat, J., concurring and dissenting at 828). The district judge's findings of fact and conclusions of law reveal that he did not hold that petitioner's claim was barred by Sykes. To the contrary, he stated that "Wainwright v. Sykes controls" and then directly proceeded to the merits of petitioner's challenges to the sentencing phase instructions and rejected them on the merits. Findings of Fact and Conclusions of Law at 4, Record Excerpts at 113-18. While the district judge did not give highly individualized consideration to each of the subparts of

20. *Lockett v. Ohio*, 438 U.S. at 598, 98 S.Ct. at 2961. See *id.* at 597-99, 98 S.Ct. at 2960-62; Comment, *First Degree Murder Statutes and Capital Sentencing Procedures: An Analysis and Comparison of Statutory Systems for the Imposition of the Death Penalty in Georgia, Florida, Texas, and Louisiana*, 24 Loyola L.Rev. 709, 710-15 (1978).

11, 253-57, 92 S.Ct. at 2731 & n. 11, 2733-36 (Douglas, J., concurring); *id.* at 309-10, 92 S.Ct. at 2762 (Stewart, J., concurring); *id.* at 313-14, 92 S.Ct. at 2764 (White, J., concurring); *id.* at 365, 92 S.Ct. at 2790 (Marshall, J., concurring); see also *id.* at 398-99, 92 S.Ct. at 2808-09 (Burger, C.J., dissenting), the 1976 cases rejected an interpretation of *Furman* as rejecting all discretion in sentencing and reaffirmed the practice of individualized decisionmaking at the sentencing stage. See *Woodson v. North Carolina*, 428 U.S. at 303-05, 96 S.Ct. at 2990-91 (plurality opinion); *Roberts v. Louisiana*, 428 U.S. at 333-36, 96 S.Ct. at 3006-3007 (plurality opinion). In *Lockett v. Ohio*, *supra*, the Court further extended the requirement of individualized sentencing, establishing a constitutional requirement in capital cases that the sentencing authority consider all mitigating evidence proffered by the defendant relating to his character, record, and the circumstances of the particular offense.

Lockett, which had its roots in the *Woodson* and *Roberts* cases, unambiguously states that the Constitution compels the sentencer to consider all relevant mitigating evidence proffered by the defendant. That rule was in no way foreshadowed by *Furman*, however, which is the only one of the Supreme Court's contemporary death-penalty cases that had been decided at the time of petitioner's trial.²¹ Because *Furman* was a major reversal of the principles articulated in previous cases challenging the death penalty and because no two of the concurring justices agreed on a rationale

for the ruling in that case, the state of the constitutional law governing capital sentencing at the time of petitioner's trial can only be characterized as one of uncertainty and confusion. More importantly, the focus of the concurring opinions in *Furman* and the one aspect of its holding as to which everyone agreed was its condemnation of unlimited discretion in capital sentencing.²² Probably the most logical, albeit incorrect, inference to be drawn from this unifying theme in the *Furman* opinions was that the decision required sentencers' consideration of both aggravating and mitigating evidence in capital cases to be based on narrowly defined statutory criteria.²³ The subsequent contrary holding of the Supreme Court in *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2934, 57 L.Ed.2d 973 (1978) does not undermine this assessment of the state of the law before that case was decided, even the plurality in *Lockett* recognized its decision was not foreshadowed by *Furman*. See note 23 *supra*. See also *Lockett v. Ohio*, 438 U.S. at 622, 98 S.Ct. at 2973 (White, J., concurring in part and dissenting in part) (Court in *Lockett* has "completed [an] about-face since *Furman v. Georgia*"); *id.* at 628-29, 631-32, 98 S.Ct. at 2973-74, 2975 (Rehnquist, J., concurring in part and dissenting in part) ("it can scarcely be maintained that today's decision is the logical application of a coherent doctrine first espoused by the opinions leading to the Court's judgment in *Furman*"); Murchison, *Toward a Perspective on the Death Penalty Cases*, 27 Emory L.J. 469, 545 (1978); Recent Development, *New Direction for*

Furman. As the Supreme Court noted, the Ohio legislature was debating death penalty legislation that would have permitted broader consideration of mitigating evidence at the time of the *Furman* adjudication. *Lockett v. Ohio*, 438 U.S. at 599 n. 7, 98 S.Ct. at 2962 n. 7. Once *Furman* was decided Ohio's legislators, "[c]onfronted with what reasonably would have appeared to be the questionable constitutionality of permitting discretionary weighing of mitigating factors after *Furman*," amended the pending legislation to restrict consideration of mitigating criteria from "any circumstance 'tending to mitigate the offense'" to three specific statutory mitigating circumstances. *Id.* (emphasis added).

21. The 1976 cases were the first decisions by the Supreme Court interpreting *Furman*. Appellant's trial preceded these decisions by two years.

22. Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Calif L.Rev. 317, 319 & nn. 7-8 (1981); Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv L.Rev. 1690, 1690-91, 1692-99 (1974).

23. Indeed, the provisions of the Ohio death penalty statute invalidated in *Lockett* as unconstitutionally limiting consideration of mitigating factors were enacted in direct response to

Capital Sentencing or an About-Face for the Supreme Court?—Lockett v. Ohio, 16 Am.Crim.L.Rev. 317, 318, 328-30 & n. 148 (1979); *The Supreme Court, 1977 Term*, 92 Harv.L.Rev. 57, 99-100, 105-08 (1978); *Recent Cases, Sentencer Must Have Some Discretion in Imposing Capital Punishment: Another Retreat from Furman v. Georgia*, 44 Mo.L.Rev. 359, 365 (1979).²⁴ Nor, for that matter, was the Lockett holding anticipated by decisions of the Florida Supreme Court rendered prior to appellant's trial. Although the Florida Legislature's enactment in 1972 of a new capital sentencing

statute went far in clarifying the meaning of *Furman*, at least as that decision was to be interpreted under Florida law,²⁵ the statute itself was barely a year old at the time of appellant's trial, and few cases had yet interpreted it or considered its constitutionality. If one can glean from the law existing at the time of appellant's trial any suggestion as to the scope of admissible mitigating evidence, it is that the Florida statute limited such evidence to that relevant to the enumerated mitigating factors.²⁶ Indeed the Florida Supreme Court's opinion affirming appellant's sentence re-

24. In addition to post-Lockett commentary such as that cited in the text, pre-Lockett analyses of the impact of *Furman* reflect an interpretation that would preclude the wide discretion in consideration of mitigating factors subsequently held to be required in Lockett. See, e.g., Note, *supra* note 23, at 1702, 1703-04, 1707; Note, *Furman to Gregg: The Judicial and Legislative History*, 22 How L.J. 53, 91-93 (1979) (article completed before Lockett though published thereafter).

25. Prior to *Furman*, Florida's death penalty statutes provided that defendants convicted of capital felonies would be punished by death unless the verdict included a recommendation of mercy concurred in by a majority of the jury. See Fla Stat Ann. § 921.141 Note (West 1973); *Dobbert v. Florida*, 432 U.S. 282, 288 & n. 3, 97 S.Ct. 2290, 2296 & n. 3, 53 L.Ed.2d 344 (1977). The recommendation of leniency was held within the exclusive province of the jury to be determined on the facts of the particular case. *Whitney v. Cochran*, 152 So.2d 727 (Fla.), cert. denied, 375 U.S. 868, 84 S.Ct. 166, 11 L.Ed.2d 118 (1963), and the jury decision, whether it recommended mercy or not, was binding on the trial judge. *State v. Miller*, 231 So.2d 260 (1970). The statutes provided no guidance concerning what evidence could be considered by the jury nor otherwise indicated in what circumstances a recommendation of mercy would be appropriate. Cf. *North v. State*, 65 So.2d 77, 100 (Fla. 1952) (en banc), *affirmed per curiam*, 346 U.S. 932, 74 S.Ct. 322, 98 L.Ed. 423 (1954) (jury may recommend mercy when any extenuating facts or circumstances appeal to them as justifying such recommendation).

Shortly after *Furman* was decided, the Florida Supreme Court held these statutes unconstitutional under *Furman*. *Donaldson v. Sack*, 265 So.2d 499 (Fla. 1972). The new Florida death penalty statute enacted in late 1972 set forth procedures under which the jury was to make its (now advisory) sentence and specific aggravating and mitigating criteria it could consider in sentencing. See Fla Stat Ann. § 775.082 (West 1976); *id.* § 921.141 (West

1973 & Supp. 1982). It thus appears that the Florida Legislature read *Furman* as requiring standards or guidelines to confine the jury's discretion in capital sentencing. See also *Proffitt v. Florida*, 428 U.S. at 247-53, 96 S.Ct. at 2964-2967 (describing how Florida procedures meet constitutional deficiencies identified in *Furman*).

26. The first case considering the constitutionality of the new Florida statute was decided prior to *Proffitt's* trial. *State v. Dixon*, 283 So.2d 1 (1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1951, 40 L.Ed.2d 295 (1974). The majority interpreted *Furman* as not abolishing discretion in capital sentencing entirely but as concerned with "the quality of discretion and the manner in which it [is] applied." *State v. Dixon*, 283 So.2d at 6. The opinion discusses the specific provisions of the new Florida death penalty statute and the extent to which they control sentencing discretion but does not expressly state whether the state's mitigating circumstances provision is an exclusive list of the factors juries may consider in mitigation. The opinion's focus on the issue of control over sentencer discretion, however, coupled with its statement that "the propounding of aggravating and mitigating circumstances" is the "most important safeguard" the statute employs to restrain and guide such discretion, *id.* at 8-9, would have supported an interpretation of § 921.141 as limiting sentencer consideration of both aggravating and mitigating circumstances to the factors expressly described in the statute. The dissenting opinion of Justice Ervin, which argues that the statute allows the jury too much discretion to satisfy the dictates of *Furman*, see *id.* at 13-14 (Ervin, J., dissenting), expressly interprets the statute to limit the aggravating and mitigating circumstances judges and juries may consider to those enumerated in the statute. *Id.* at 17.

In *Cooper v. State*, 336 So.2d 1133, 1139 (1976), the Florida Supreme Court strongly suggested that the only factors relevant to sen-

flects the view that the sentencer's role is limited by the statutory criteria.²⁷

In short, review of the case law existing at the time of Ford's trial leads to the inescapable conclusion not only that the *Lockett* decision was not presaged by the precedents but that a rule contrary to that eventually established in *Lockett* was strongly suggested by those decisions. Indeed, in 1974 counsel would have to have been blessed with "extraordinary vision" to have anticipated that the Supreme Court would establish the broad right to sentencer consideration of mitigating evidence sanctioned in *Lockett*. *Engle* indicates that counsel is not expected to possess such prophetic powers.²⁸ Because at the time of Ford's trial the "tools to construct [his] constitutional claim" were unavailable, see *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1575, 71 L.Ed.2d at 804, his failure to object to the mitigating circumstances instructions at the sentencing hearing was justified by cause within the meaning of *Wainwright v. Sykes*, *supra*. Further, as established in *Lockett* and discussed *infra* under 'Prejudice,' the preclusion of consideration of mitigating evidence "render[s] the [sentencing proceeding] fundamentally unfair." *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1573, 71 L.Ed. at 802.

2. Prejudice

The majority holds that Ford was not prejudiced by the jury instructions on miti-

tigating under the Florida scheme are the statutory aggravating and mitigating circumstances. This holding was followed until, after the Supreme Court's decision in *Lockett*, the Florida court, reassessed its prior decisions and held that all mitigating evidence, statutory or non-statutory, is admissible. *Songer v. State*, 365 So.2d 696, 700 (1978) (on rehearing). Although the *Songer* court attempted to reconcile *Cooper*, see *id.* at 700, it has recognized that *Cooper* was interpreted as precluding consideration of nonstatutory mitigating evidence. See *Perry v. State*, 395 So.2d 170, 174 (1980).

27. The opinion states:

We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitigation during the sentencing trial. We do not pretend to know what motivated Alvin Bernard Ford to take the life of Dimitri Walter Ilyankoff. Our duty under section 821.141, Flori-

gating circumstances. It states four bases for this conclusion. Three of these bases concern whether the instruction operated to preclude the jury from considering nonstatutory mitigating evidence and thus directly address the merits of petitioner's claim. To the extent the majority subsumes its analysis of the merits within its discussion of prejudice, it confuses two issues that should be treated separately. The notion of prejudice under the *Sykes* exception to waiver refers to the harm, if any, stemming from a constitutional violation. Because prejudice is thus defined as a product of constitutional error, determining the existence of prejudice might seem to require a preliminary inquiry into whether the error asserted has been committed. Logical though this approach might seem, however, it is not the correct analysis. For prejudice, in this context, is a component of the procedural question whether a habeas petitioner has waived his right to raise a constitutional issue in federal court. As such, prejudice is an issue that, along with the other components of the waiver analysis, must be determined *prerequisite* to deciding the merits of the substantive constitutional claim. If the federal court determines that the petitioner has waived his claim and either the cause or prejudice element of the exception to waiver is lacking, it must, in the interests of finality and deference to the state courts,

da Statutes (1975), as upheld by the United States Supreme Court in *Proffitt v. State*, *supra*, is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry to the facts of the capital cases which come before us. *Ford v. State*, 374 So.2d at 503 (emphasis added). A comparison of the Florida court's opinion in *Ford* with its opinion in *Songer v. State*, *supra* suggests that it considers the *Lockett* holding as narrowly confined to the question of admissibility of evidence and not as affecting the sentencers' or reviewing court's roles. *Washington v. Watkins*, 655 F.2d at 1375 and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) repudiate this view. See text *infra* at 859-860.

28. *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1573, 71 L.Ed.2d at 802. See note 18 *supra*.

decline to adjudicate the merits of the constitutional claim. *Wainwright v. Sykes*, *supra*. In order to decide whether prejudice exists before deciding the merits of the claim in question, the court must assume, for purposes of resolving the prejudice issue, that constitutional error has been committed.²⁹ Approaching the prejudice issue from this perspective narrows the inquiry. The court need not resolve at this juncture whether the petitioner has shown a deprivation of constitutional right that has in turn caused him harm; rather the court should assume that a constitutional violation occurred and decide only whether such violation worked to "[the petitioner's] actual and substantial disadvantage," *United States v. Frady*, — U.S. —, —, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816, 832 (1982) (emphasis the Court's).³⁰ If the record reveals actual prejudice, then, and only then, should the court decide whether constitutional error occurred. As the Supreme Court has stated, this approach, which avoids deciding issues not fairly presented to the state courts, minimizes federal intrusion into the states' criminal adjudication systems and

encourages state courts to take seriously their federal constitutional responsibilities. *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1571, 1572, 71 L.Ed.2d at 800, 801.

Applying this approach to the instant case, we must assume for the moment that petitioner has established a constitutional violation, i.e., that the jury instructions reasonably could have been interpreted to limit consideration of mitigating evidence to that falling within the statutory mitigating factors. See *Washington v. Watkins*, 655 F.2d 1346, 1369 (5th Cir.1981). Assuming such error did occur, we must determine whether actual prejudice resulted.

The majority cites two factors in support of its conclusion that petitioner was not prejudiced by the mitigating circumstances instructions: (1) that the trial judge did not prevent the defense attorney from introducing evidence of nonstatutory mitigating factors, and (2) that defense counsel referred to such evidence in his closing argument.³¹ In *Washington v. Watkins*, *supra*, the former Fifth Circuit rejected both of these factors as bases for holding a *Lockett*

29. In cases where the constitutional claim raised by the petitioner is obviously lacking in merit it may be appropriate to dispose of the substantive claim without first addressing waiver, particularly where the latter issue involves legal or factual questions that will be difficult to resolve. Because this approach undercuts the interests served by the waiver rule, however, it should be used sparingly.

30. In *United States v. Frady*, the petitioner had asserted that the state trial court violated his constitutional rights by instructing the jury incorrectly on malice. — U.S. at —, 102 S.Ct. at 1589, 1592, 71 L.Ed.2d at 824, 827. Frady had waived his claim by failing to raise it at trial or on direct appeal, *id.* at —, 102 S.Ct. at 1589, 71 L.Ed.2d at 824, and the Court declined to recognize an exception to the waiver rule under *Sykes* because it held petitioner had not established that he was actually prejudiced by the allegedly erroneous instruction. *Id.* at —, 102 S.Ct. at 1594, 71 L.Ed.2d at 830. The harm asserted by Frady—that the instructions relieved the government of its burden of proving malice and thus discouraged the jury from considering the lesser included offense of manslaughter—the Court found was neutralized by the "overwhelming" evidence of malice

"coupled with Frady's utter failure to come forward with a colorable claim that he acted without malice." *Id.* at —, 102 S.Ct. at 1596, 1597, 71 L.Ed.2d at 832, 833. Moreover, the fact that the jury had convicted Frady not merely of second degree murder, which required only malice, but of first degree murder, which required a finding of premeditation and deliberation, showed that the jury's view of the facts was inconsistent with the mitigating factors that would have reduced the offense to manslaughter and with an absence of malice. *Id.* at — & n. 19, 102 S.Ct. at 1597-98 & n. 19, 71 L.Ed.2d at 833-34 & n. 19. See also *Wainwright v. Sykes*, 433 U.S. at 91, 97 S.Ct. at 2508 (other evidence of guilt negated possibility that admission of petitioner's inculpatory statement prejudiced him).

31. As noted above, the majority opinion presents four reasons for denying petitioner relief on the mitigating circumstances claim, three of which address the merits. I will address the majority's third reason, which pertains to the prejudice issue, at this juncture. The majority's first, second, and fourth bases will be treated in my discussion of the merits of petitioner's *Lockett* claim. See section II.B *infra*.

error harmless.³² Addressing the contention that admission of nonstatutory mitigating evidence averted the harm from an erroneous mitigating circumstances instruction, the Washington court stated:

[This argument] completely miss(es) the point of the Supreme Court's holding in *Lockett*. Sandra Lockett also introduced evidence of nonstatutory mitigating factors, and also argued their relevance to the sentencer. The fatal flaw in *Lockett* was not the exclusion of evidence relating to nonstatutory mitigating factors, but the limitation on the sentencer's consideration of that evidence except as it related to the statutory mitigating factors.

Id. at 1375. *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) further refutes the majority's position. In that case the defense attorney had introduced extensive nonstatutory mitigating evidence at the sentencing hearing. See *id.* at 108 & n.2, 102 S.Ct. at 873 & n.2, 71 L.Ed.2d at 6 & n.2. The trial judge in sentencing the defendant refused to consider that evidence, however, because he interpreted the sentencing statute as precluding consideration of nonstatutory factors. *Id.* at 108, 112-115, 102 S.Ct. at 873, 875-876, 71 L.Ed.2d at 7, 9-10. The Supreme Court reversed the sentence despite the fact that the Oklahoma statute permitted the defendant to present any mitigating evidence and that the judge had in fact admitted nonstatutory evidence. *Id.* at 106, 115 & n.10, 102 S.Ct. at 872, 876 & n.10, 71 L.Ed.2d at 6, 11 & n.10. The Court held that the trial court's refusal to consider the evidence violated *Lockett*, reasoning:

Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard

the mitigating evidence *Eddings* proffered on his behalf. The sentencer, and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Id. at 113-115, 102 S.Ct. at 875-876, 71 L.Ed. at 10-11. The argument advanced by the majority that admission of nonstatutory evidence renders a *Lockett* violation harmless cannot be reconciled with the holdings in *Lockett*, *Eddings* and *Washington*.

The majority's reliance on the fact that defense counsel referred to the nonstatutory mitigating evidence in his arguments before the jury also conflicts with *Washington*.

As the Supreme Court has noted in a related context, "arguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky*, 436 U.S. 478, 488-89, 98 S.Ct. 1930, 1936-37, 56 L.Ed.2d 468 (1978) (concluding that trial court's omission of instruction on presumption of innocence was not remedied by defense counsel's explanation of the presumption in opening and closing argument). Only an instruction from the trial court can invest a particular concept—here the jury's ability to consider nonstatutory mitigating factors—with the authority of the court. See *id.* at 489, 98 S.Ct. at 1936-37. Indeed, were a jury to consider nonstatutory mitigating factors despite instructions by the court to the effect that it was duty-bound to consider only the two statutory mitigating circumstances, it would be acting "lawlessly," see *Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell, and Stevens). "There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept [an] invitation to disregard the trial

32. *Washington* was decided by a Unit A panel of the former Fifth Circuit on September 14, 1981, prior to the division of that Circuit into the new Fifth and Eleventh Circuits. Thus the decision in *Washington* is binding on the Eleventh Circuit until expressly overruled by the en banc court. *Bonner v. City of Prichard*, 661

F.2d 1206 (11th Cir.1981) (en banc). Compare *id.* with *Stein v. Reynolds Securities, Inc.*, 667 F.2d 33, 34 (11th Cir.1981) (decisions by Unit A panels of former Fifth Circuit after October 1, 1981 not binding on Eleventh Circuit).

judge's instructions." *Roberts v. Louisiana*, 428 U.S. 325, 335, 96 S.Ct. 3001, 3007, 49 L.Ed.2d 974 (1976) (opinion of Stewart, Powell, and Stevens).

Washington v. Watkins, 655 F.2d at 1375 (emphasis added). See also *Bell v. Ohio*, 438 U.S. 637, 641-43, 98 S.Ct. 2977, 2980-81, 57 L.Ed.2d 1010 (1978) (reversing death sentence even though defendant had argued nonstatutory mitigating factors justified penalty less than death where sentencing judges believed they were limited to statutory mitigating factors).

Lastly, no contention can be made that petitioner failed to present any significant nonstatutory mitigating evidence. Several witnesses testified on his behalf at the sentencing hearing. Ford's mother testified that his father had been a belligerent alcoholic during his childhood. She described petitioner's efforts, as a boy, to assume paternal responsibilities toward his younger siblings, including working during high school and after graduation to provide financial support for the family. A psychiatrist testified that Ford was bright and an overachiever but that he suffered from a type of brain damage known as Dyslexia, which results in a difficulty working with numbers. The psychiatrist described Ford's generally successful endeavors in his employment, which were subsequently thwarted when a promotion placed him in a position requiring mathematical computations. In the psychiatrist's view, Ford's actions in

committing the robbery and murder stemmed from intense depression and frustration related to his disability rather than from a lack of moral standards. The psychiatrist stated that he believed petitioner could be rehabilitated. Because petitioner has demonstrated a substantial likelihood that the jury's misunderstanding of its responsibility to consider nonstatutory mitigating evidence critically affected its sentencing decision, I would hold that he has established actual prejudice under *Frady* and *Sykes* entitling him to an adjudication of the merits of his *Lockett* claim.

B. Merits

The majority states three reasons for holding that the mitigating circumstances instructions did not violate the rule of *Lockett*, none of which are persuasive. The majority recognizes that the standard of review governing constitutional challenges to jury instructions requires the court to determine "the way in which a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979) (emphasis added). Yet it relies on a "narrow parsing of language"³³—the omission of the word "only" from the mitigating factors instruction, as compared with its inclusion in the aggravating factors instruction—in concluding that the jurors could not have believed they were limited to the statutory mitigating factors.³⁴ I am aware

Third: Based on those considerations whether the defendant should be sentenced to life imprisonment or to death.

As to aggravating circumstances, in considering whether sufficient aggravating circumstances exist to justify a sentence of death, you shall consider only the following:

A, whether the defendant was under sentence of imprisonment when the defendant committed the murder of which he has just been convicted by you;

B, whether the defendant has previously been convicted of another capital felony or of a felony involving the use of or threat of violence to the person;

C, whether in committing the murder of which the defendant has just been convicted by you, the defendant knowingly created a great risk of death to many persons;

33. *Washington v. Watkins*, 655 F.2d at 1370.

34. The jury instructions given by the trial judge at Ford's trial provided:

Ladies and gentlemen, you have heard the evidence and argument of counsel necessary to enable you to render an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment.

Your advisory sentence will have three parts.

First: Whether sufficient aggravating circumstances exist to justify a sentence of death.

Second: Whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death.

that a plurality of the United States Supreme Court interpreted the similar language of Florida's sentencing statute³⁵ as not precluding consideration of nonstatutory mitigating factors. See *Proffitt v. Florida*, 428 U.S. at 250 n.8, 96 S.Ct. at 2965 n.8. See also *Lockett v. Ohio*, 438 U.S. at 606, 98 S.Ct. at 2965. The Florida Supreme Court, interpreting the same statutory provision, arrived at the opposite conclusion, however. See *Cooper v. State*, 336 So.2d 1133, 1139 & n.7 (Fla.1976), cert. denied, 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977). See also notes 26-27 and accompanying text *supra*. If judges reasonably dif-

fered on the meaning of the provision, surely rational jurors likewise could have arrived at opposing interpretations. Moreover, even had the courts agreed on the meaning of the statute, the subtle nuances of statutory language on which judicial construction of legislative enactments so often turns are simply inadequate bases for discerning the possible understanding of jurors, who are less familiar with such legal niceties. Moreover, the former Fifth Circuit, in *Washington v. Watkins*, 655 F.2d at 1370 & nn.45-46, rejected an argument identical to that now espoused by the majority.³⁶ Although the majority purports to

D, whether the murder of which you have convicted the defendant was committed while the defendant was engaged in the commission of or attempt to commit, or flight after committing, or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb.

E, whether the murder of which the defendant has just been convicted by you was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

F, whether the murder of which the defendant has just been convicted by you was committed for pecuniary gain;

G, whether the murder of which the defendant has just been convicted by you was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws;

H, whether the murder of which the defendant has just been convicted by you was especially heinous, atrocious, or cruel.

As to mitigating circumstances, in considering whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following:

A, whether the defendant has no significant history of prior criminal activity;

B, whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

C, whether the victim was a participant in the defendant's conduct or consented to the act;

D, whether the defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

E, whether the defendant acted under extreme duress or under the substantial domination of another person;

F, whether the capacity of the defendant to appreciate the criminality of his conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired;

G, the age of the defendant at the time of the crime

35. The Florida statute provides that "Aggravating circumstances shall be limited to the following: [listing nine criteria]," Fla. Stat. Ann. § 921.141(5) (West Supp.1982), and that "Mitigating circumstances shall be the following: [listing seven criteria]," *id.* § 921.141(6).

36. The instructions invalidated in *Washington* were as follows:

Members of the jury, as the court explained to you in the beginning of the trial, you have heard some evidence in aggravation put on by the State and you have heard evidence in mitigation put on by the defendant. You must in your sentencing find at least one item present of aggravation before you could impose the death penalty. If you find an item in aggravation present beyond a reasonable doubt, then you must consider any evidence in mitigation. And unless the evidence in mitigation could overcome the aggravation, of course, then you could return the death penalty.

You have found the defendant guilty of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision you must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself. To return the death penalty you must find that the aggravating circumstances, those which tend to warrant the death penalty, outweigh the mitigating circumstances, which are those which tend to warrant the lesser [sic] severe penalty. Now consider only the following elements of aggravation in determining whether the death

distinguish *Washington* on other grounds, its reasoning directly contravenes that of the *Washington* court.

The instructions given to the jury in this case were identical in most critical respects to those held invalid in *Washington v. Watkins*, 655 F.2d 1346 (5th Cir.1981). See notes 34 and 36 *supra*. The majority attempts to distinguish *Washington* on the basis of (1) the concluding reference by the trial judge in *Washington* to "the preceding elements of mitigation" and (2) the fact that the charge here listed all the statutory elements of mitigation whereas in *Washington* the judge listed only two of the statutory factors. The majority's reliance on the "preceding elements" language is misplaced. While it is true that the *Washington* court found that language "further supported" the inference that the enumerated factors were the sole factors to be considered by the jury, *id.* at 1370, the court concluded that "a reasonable juror might well infer" the listed factors were exclusive from the judge's use of the term "only" with respect to aggravating factors and from the immediately following "almost exactly parallel[]" language pertaining to mitigating circumstances. These two features of the judge's instruction alone would have supported such inference. See *id.* The "preceding elements" language present in *Washington* was supportive, but clearly not the decisive factor in the court's decision. *Id.* Nor does the trial judge's enumeration of all the statutory mitigating factors here in comparison with two listed in *Washington* provide a basis for distin-

guishing the two cases. We are concerned solely with whether the jury reasonably may have believed it was limited to considering mitigating evidence that fit within the statutorily enumerated factors. Whether the instructions set forth two, five, or a dozen statutory factors has no bearing on the jury's understanding of the defendant's right under *Lockett* to have it consider nonstatutory factors as well. At petitioner's sentencing hearing, as in *Washington's* and *Lockett's*, his attorney presented evidence concerning his character and background. "[N]owhere in the trial court's charge to the jury in the sentencing phase of [petitioner's] trial is there any explicit instruction that the jury was free to consider mitigating factors other than [those enumerated in the statute]," however. *Washington v. Watkins*, 655 F.2d at 1365. In *Washington*, the court found that no language in the charge rectified the absence of such an instruction by indicating to a reasonable jury that it was not limited to the statutory factors. The court reached this conclusion despite the trial judge's prefatory instruction that in reaching its decision the jury "must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself." *Id.* at 1369-70. Here there was lacking even the vague reference to the defendant's character and circumstances that was present in the *Washington* case. See note 34 *supra*. Thus, the instructions given in petitioner's sentencing hearing were even less likely to effectuate petitioner's right to have the jury consider evidence of his character and background than

penalty should be imposed: One, the capital murder was committed while the defendant Johnny Lewis Washington was engaged in the commission of the crime of robbery. Two, the defendant Johnny Lewis Washington committed this capital murder in an especially heinous, atrocious, or cruel manner. Those are your elements of aggravation.

You must unanimously find beyond a reasonable doubt that one or more of these existed in order to return the death penalty.

Now if one or more of those elements of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravat-

ing circumstances. Now consider the following elements of mitigation in determining whether the death penalty should not be imposed: One, that the defendant has no significant history of prior criminal activity and two, the defendant's age at the time of the capital murder.

If you unanimously find from the testimony that one or more of the preceding elements of mitigation exist[s], then you must consider whether it outweighs the aggravating circumstances you previously found and you must return one of the following verdicts.
Washington v. Watkins, 655 F.2d at 1367-68. Compare above with note 34 *supra*.

the instructions invalidated in *Washington*.³⁷

Finally, the majority ascribes great significance to the sentencing judge's finding that "[t]here are no mitigating circumstances existing—either statutory or otherwise—which outweigh any aggravating circumstances." Majority Opinion, *supra* at 813 (quoting Trial Court Findings on Sentencing, reprinted in *Ford v. State*, 374 So.2d 496, 500-02 n.1 (Fla.1979)). From this four-word phrase buried in the middle of the trial judge's detailed findings concerning the statutory mitigating and aggravating factors, the majority discerns not only an understanding on the part of the judge that nonstatutory mitigating evidence was relevant; the majority additionally "conclude[s]" from these words that the "judge's perception of what could be considered was conveyed to the jury." Majority Opinion, *supra* at 813 (emphasis added). With all due respect, I am unable to follow the majority's reasoning. It has always been my understanding that jury instructions, not trial court findings, serve the function of informing the jury of the law. For the reasons stated above, I do not be-

lieve the instructions in this case adequately informed the jury of its duty to consider nonstatutory mitigating evidence.

III.

Effect of Florida Supreme Court's Overruling of Aggravating Circumstances Found by Trial Court

Under Florida's capital sentencing statute, Fla.Stat. Ann. § 921.141 (West Supp. 1982), the judge's task in deciding whether to impose the death sentence entails several steps. The judge must first determine whether any of the statutory aggravating factors exist. *Id.* § 921.141(3), (5). He must "weigh" any aggravating factors found to exist and determine whether they are "sufficient" to impose the death penalty. See *id.* § 921.141(3). If he finds there are "sufficient aggravating factors," he must then inquire whether sufficient mitigating factors exist to outweigh the aggravating factors. *Id.*

In *Ford's* case, the trial judge found that all eight of the statutory aggravating factors³⁸ and none of the mitigating ones were

judge, which stated: "Judge Lee, we would like the list of charges regarding the definitions of aggravating circumstances and mitigating circumstances. Signed L. Pati, foreman." The defense attorney objected to the judge's re-instructing the jury on this point, but stated that if the court was to do so he would prefer the instruction be given orally rather than in writing. The judge informed the foreman that he would not provide the jury with a written charge but would again read it if the jury wished. The foreman then said to the other jurors: "You want to hear them again; what they consider the aggravating circumstances, what they consider the mitigating circumstances. They can't give us the things to take in. He will read them again for us; okay?" The judge then repeated the instruction previously given concerning aggravating and mitigating factors. The foreman's request for reinstruction concerning "what [the court] consider[s] the mitigating circumstances" indicates that he understood the circumstances enumerated by the court to be exclusive.

37. *Sandstrom v. Montana*, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979), applied in the context of a *Lockett*-based challenge to jury instructions, requires remand for resentencing if the trial court's instructions, taken in their entirety, could have led a reasonable juror to believe he could consider only the statutory mitigating circumstances. See *Washington v. Watkins*, 655 F.2d at 1369, 1370-71. Our inquiry is thus an objective one that focuses on the judge's instructions, and petitioner is not required to prove actual subjective misunderstanding of the law by the jurors. Although petitioner need not establish the actual state of mind of the jurors, evidence of their subjective understanding if available may support a conclusion that the instructions could reasonably have engendered their misunderstanding of the law. In this case, there is evidence in addition to the judge's instructions suggesting that the jurors actually considered themselves limited to the statutory mitigating circumstances. At the sentencing hearing, the judge read to the jury the charge concerning aggravating and mitigating circumstances. See note 34 *supra*. He did not give the jury a copy of that portion of the charge, however, because petitioner's attorney requested that he not do so. Shortly after the jury began its sentencing deliberations, the foreman submitted a request to the

38. The current version of the statute lists nine aggravating factors. See Fla.Stat. Ann. § 921.141(5)(a)-(i) (West Supp.1982). The ninth aggravating factor was added by amendment in 1979. 1979 Fla.Laws, c. 79-353, § 1.

present and sentenced appellant to death. In his written findings the judge stated that aggravating factor (a) (defendant under sentence of imprisonment at time capital felony committed) was established because "[a]lthough the defendant was not imprisoned at the time of the murder, he did actually prevent arrest, prosecution and imprisonment for his other crime, at least temporarily, by the very murder for which he has been convicted." Trial Court's Findings on Sentence, reprinted in *Ford v. State*, 374 So.2d at 499-501 n.1. He specifically concluded that this aggravating circumstance "justifies a sentence of death." *Id.* The judge found that aggravating factor (b) (defendant previously convicted of another capital felony or felony involving violence to person) was present because

[T]he defendant has been found guilty of breaking and entering to commit a felony, which would obviously involve the threat of violence to the person of anyone whom he might have confronted on the premises. Further, he has admitted the unlawful sale of narcotic drugs, which likewise involves a threat to the safety of members of the public.

Id. He concluded that this factor also "justifies the imposition of the sentence of death." *Id.* Of the six other aggravating factors the judge found, he did not specifically state that any one of them justified the death sentence.³⁹

On appeal, the Florida Supreme Court held the trial court incorrectly found that aggravating factors (a) and (b) were established. *Ford v. State*, 374 So.2d at 502.

39. The concluding paragraph of the judge's findings indicates that the judge may have considered factor (h) (murder especially heinous, atrocious, and cruel) alone sufficient to support the death penalty. The finding pertaining specifically to that factor does not, in contrast to the findings on factors (a) and (b), state that it justifies the death sentence, however. Whether the judge would have imposed the death sentence absent his error in applying the statutory aggravating factors thus cannot be determined from the findings, and any attempt to answer that question would be sheer speculation.

The Florida Supreme Court stated only that the trial court had "erred," but its basis for so holding was obviously the fact that the evidence cited by the trial court in support of factors (a) and (b) did not conform to the terms of the statute. See *Peek v. State*, 395 So.2d 492, 499 (Fla.1980), cert. denied, 451 U.S. 964, 101 S.Ct. 2036, 68 L.Ed.2d 342 (1981) (factor (a) requires that defendant have been incarcerated pursuant to prison sentence at time of offense); *Provence v. State*, 337 So.2d 783, 786 (Fla.1976) (factor (b) requires actual prior conviction). The Florida Supreme Court also rejected the trial court's findings that aggravating factors (d) (homicide committed while defendant engaged in attempted robbery) and (f) (homicide committed for pecuniary gain) were both present because the evidence used to support each was the same. The court held that these should have been viewed as a single aggravating factor. *Ford v. State*, 374 So.2d at 502-03. Although the Florida Supreme Court thus eliminated three of the aggravating factors relied on by the trial judge, it affirmed Ford's sentence on the ground that "five aggravating circumstances may properly be said to exist in this case" and, "there being no mitigating factors present death is presumed to be the appropriate penalty." *Id.* at 503.

As the majority notes, in *Henry v. Wainwright*, 661 F.2d 56 (5th Cir.1981), vacated on other grounds, — U.S. —, 102 S.Ct. 2922, 73 L.Ed.2d 1326 (1982), judgment reinstated on remand, 686 F.2d 311 (5th Cir. 1982)⁴⁰ and *Stephens v. Zant*, 631 F.2d 397

40. In our first opinion in *Henry*, we indicated that the petitioner had failed to object at trial to the jury instructions that were the subject of his habeas challenge. *Henry v. Wainwright*, 661 F.2d at 57. The state argued that by violating Florida's contemporaneous objection rule Henry had waived his claim of error in the instructions under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). The *Henry* court rejected this argument, however, on the ground that an objection would have been futile.

The Supreme Court vacated the former Fifth Circuit decision in *Henry* for reconsideration in light of *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). *Henry v. Wain-*

(5th Cir.1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir.1981), *certified to Supreme Court of Georgia*, — U.S. —, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982).⁴¹ The former Fifth Circuit held that resentencing was required where the sentencer had considered, respectively, nonstatutory aggravating factors and aggravating factors determined to be unconstitutionally vague. The majority distinguishes those cases, however, on the ground that the trial judge's errors in this case, which it characterizes as evidentiary insufficiency and multiple consideration of one aspect of Ford's offense, do not involve "consider[ation] [of] any extraneous or improper evidence." Majority Opinion, *supra* at 814. I disa-

gree with the majority's position for two reasons.

First, the majority's premise—that the trial judge did not consider any improper evidence in deciding what sentence to impose—is incorrect. The evidence cited by the trial judge in support of aggravating factors (a) and (b) was irrelevant to those criteria. Moreover, at least some of that evidence was irrelevant to any of the aggravating circumstances enumerated in § 921.141(5).⁴² The fact that such evidence may have been properly admitted at the guilt phase of trial did not give the judge license to consider it as a basis for imposing the death sentence. Only those factors spe-

wright, — U.S. —, 102 S.Ct. 2976, 73 L.Ed.2d 1361 (1982). In *Engle*, the Supreme Court held that "the futility of presenting an objection to the state courts cannot alone constitute cause for a failure to object at trial." *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1572, 71 L.Ed.2d at 802. The Supreme Court's decision to vacate *Henry* presumably was based on the *Henry* court's articulation of a standard for cause that may conflict with that adopted in *Engle*.

After remand from the Supreme Court, this court clarified the earlier opinion and concluded that defendant had objected to the instructions at trial, but simply had not belabored the objection. *Henry v. Wainwright*, 686 F.2d 311 at 313. Alternatively, because the Florida courts "must have excused any default in order to reach the merits" of *Henry*'s claim, any default was forgiven. *Id.* at 314. Thus, there was no waiver under *Engle* or *Wainwright v. Sykes*. Consequently, the panel reinstated the prior judgment, holding that consideration of nonstatutory aggravating circumstances rendered the sentence constitutionally infirm and mandated vacation of the sentence. *Henry v. Wainwright*, 686 F.2d 311 at 314.

The waiver issue involved in *Henry* is not present with respect to Ford's aggravating circumstances claims, which are aimed not at the jury instructions but rather at the trial judge's findings on aggravating circumstances. Obviously no objection to the findings could have been raised at trial because the judge did not make the findings until after the trial. On his direct appeal to the Florida Supreme Court, petitioner objected to the findings concerning aggravating circumstances, and that court ruled on the merits of such challenge.

41. The Supreme Court's order certifying the *Stephens* case to the state supreme court for clarification of the state law premises for that court's decision does not address the appropriateness of the relief ordered by the Fifth Cir-

cuit. The three dissenting justices were clearly of the view that resentencing was constitutionally required. See *Zant v. Stephens*, — U.S. —, 102 S.Ct. 1856, 1860, 72 L.Ed.2d 222, 228 (1982) (Marshall, J., joined by Brennan, J., dissenting). *Id.* at —, 102 S.Ct. at 1864, 72 L.Ed.2d at 235 (Powell, J., dissenting). The Supreme Court has received an answer to its certification to the state supreme court, *Zant v. Stephens*, 250 Ga. 97, 297 S.E.2d 1 (1982), but has not yet issued a final decision in the case. Thus, the issue is still pending before the Court. Even more significant is the Court's recent grant of certiorari in *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), *cert. granted*, — U.S. —, 103 S.Ct. 340, 74 L.Ed.2d — (1982), which appears to present virtually the identical issue as is raised in this case. There, in addition to considering aggravating factors allegedly unsupported by the evidence, a nonstatutory aggravating circumstance was considered. Because in my opinion Ford's case cannot, on a principled basis, be distinguished from *Stephens*, or *Barclay*, the Supreme Court's decision in either of these cases will probably affect the outcome of this case. For this reason, decision of the aggravating circumstances issue should be deferred until the Supreme Court has decided the merits of *Stephens* and *Barclay*.

42. The evidence cited in support of factor (a), see text *supra* at 864, is relevant to, and indeed was relied on by the judge in support of, aggravating factor (e) (murder committed for purpose of avoiding lawful arrest or effecting escape from custody). Trial Court Findings on Sentence, reprinted in *Ford v. State*, 374 So.2d at 501-02 n. 1. The evidence cited in support of factor (b), however, particularly the defendant's "admission" [of] the unlawful sale of narcotics drugs, is irrelevant to any of the other statutory factors.

efically delineated in the statute may be considered in the sentencing process, and reliance on information irrelevant to those factors, whether or not properly before the sentencer for other purposes, violates the defendant's right to channelled sentencer discretion under *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). Nor does the trial judge's attempt to fit these square pegs of fact into the round holes of the statutory criteria rectify his error. His consideration of these facts was no less a departure from the legislative guidelines than the complete disregard for the limits imposed by the statutory factors committed by the sentencer in *Henry*.

Second, even if all the evidence considered by the trial judge in imposing sentence was relevant to some of the statutory aggravating criteria, the judge's reliance on an incorrect legal theory in determining petitioner's sentence renders the sentence invalid. The cases are legion that have reversed criminal convictions where the jury was permitted to consider an improper legal theory. Even where a general verdict renders impossible the determination whether the jury in fact relied on the improper theory, a conviction possibly predicated on such mistaken interpretation of the law will not stand. *Bachellar v. Maryland*, 397 U.S. 564, 570-71, 90 S.Ct. 1312, 1315-16, 25 L.Ed.2d 570 (1970); *Street v. New York*, 394 U.S. 576, 585-88, 89 S.Ct.

1354, 1362-64, 22 L.Ed.2d 572 (1969); *Yates v. United States*, 354 U.S. 296, 311-12, 77 S.Ct. 1064, 1072-73, 1 L.Ed.2d 1356 (1957); *Terminiello v. Chicago*, 337 U.S. 1, 6, 69 S.Ct. 894, 896, 93 L.Ed. 1131 (1949); *Cramer v. United States*, 325 U.S. 1, 36 n.45, 65 S.Ct. 918, 935 n.45, 89 L.Ed. 1441 (1945); *Ashcraft v. Tennessee*, 322 U.S. 143, 155-56, 64 S.Ct. 921, 927, 88 L.Ed. 1192 (1944); *Williams v. North Carolina*, 317 U.S. 287, 291-92, 63 S.Ct. 207, 209-10, 87 L.Ed. 279 (1942); *Stromberg v. California*, 283 U.S. 359, 369-70, 51 S.Ct. 532, 535-36, 75 L.Ed. 1117 (1931). Here there is no uncertainty. It is clear from the trial judge's findings that he based his sentence at least in part on (1) evidence that did not comprise two of the aggravating factors he cited and (2) two aggravating circumstances that were based on the same facts and were therefore cumulative. Had these factors constituted the sole aggravating circumstances found by the judge, there is little question that the sentence would have been invalid under both state and federal law.⁴³ Hence, the only remaining question is whether the judge's partial reliance on improper aggravating factors can be viewed as harmless in view of the five valid aggravating factors he found. The Florida Supreme Court answered this question in the affirmative, stating that where some aggravating factors and no mitigating factors⁴⁴ are found

43. The Florida Supreme Court has reversed death sentences in cases in which it has invalidated the only aggravating factor(s) found by the sentencing judge. E.g., *Perry v. State*, 395 So.2d 170, 172, 174-75 (Fla.1981); *Purdy v. State*, 343 So.2d 4 (Fla.1977). Moreover, it has reversed death sentences partially predicated on improper aggravating circumstances when any mitigating factors were established. E.g., *Gafford v. State*, 387 So.2d 333, 337 (Fla.1980); *Lewis v. State*, 377 So.2d 640, 646-47 (Fla.1980); *Fleming v. State*, 374 So.2d 954, 957-59 (Fla.1979).

The United States Supreme Court has reversed a death sentence on federal constitutional grounds where the state supreme court rejected all three of the theories relied on by the sentencing jury in support of an aggravating factor. *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978) (per curiam). The Court held the defendant's right to due process was violated by the state supreme

court's affirmance of his sentence on the basis of a theory that the sentencing jury had not been instructed to consider. *Id.* at 16-17, 99 S.Ct. at 236-237. See also *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (holding sentencer's application of "outrageously or wantonly vile, horrible and inhuman" aggravating factor to particular case unconstitutional and invalidating death sentence based solely on that factor).

44. An essential premise of the Majority's and the Florida court's harmless-error analysis—that there are no mitigating factors—cannot, in my view, be established in this case because the trial judge and jury erroneously believed they could not consider nonstatutory mitigating evidence. See Section II B. *supra*. In the following section of this opinion I will assume that no mitigating circumstances could have been established, however, because the outcome of petitioner's aggravating factors claim,

death is "presumed to be the appropriate penalty." This statement, which the majority adopts, is susceptible of either of two interpretations. Neither in my view provides a constitutional basis for affirming a sentence partly predicated on improper aggravating factors.

The state court's remark that where some aggravating and no mitigating factors are present "death is presumed appropriate" could be understood to mean that the initial sentencer must impose the death penalty if it finds any aggravating and no mitigating factors. An alternative interpretation is that the appellate court is engaging in a presumption, for review purposes, that when the initial sentencer has found some aggravating factors and no mitigating ones it would have imposed the death sentence even if it had not considered the erroneous aggravating factors. See *Zant v. Stephens*, — U.S. —, —, 102 S.Ct. 1856, 1859, 72 L.Ed.2d 222, 227 (1982). I would be hesitant to attribute to the Florida court the first interpretation of the statute, which would make the death penalty mandatory in all cases in which some aggravating and no mitigating factors are found. The statutory language does not support this interpretation. It requires both the advisory jury and the sentencing judge initially to determine "[w]hether sufficient aggravating circumstances exist as enumerated in subsection (5) [of the statute]." Fla. Stat. Ann. § 921.141(2), (3) (West Supp. 1982). Only after finding that there are "sufficient" aggravating factors are the jury and judge instructed to address mitigating factors. *Id.* The statutory language thus suggests that death is appropriate only where the sentencers make an individualized judgment that the aggravating factors they have identified are sufficiently grave to justify that punishment. Another reason I would not attribute this interpretation of the statute to the Florida Court is

correctly analyzed, does not depend on the existence of mitigating circumstances.

43. The Florida cases do not make clear which of these two interpretations underlie the rule. The state cites *Elledge v. State*, 346 So.2d 998

that the statute as so interpreted would pose significant constitutional questions. The Supreme Court has held that capital sentencing schemes may not, consistently with eighth amendment principles, eliminate all sentencer discretion by making the death sentence mandatory for certain statutorily defined categories of offenses. See *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). Moreover, the Court has recently reaffirmed the importance of individualized sentencing by holding that the scope of mitigating evidence a defendant may proffer on his own behalf may not be unduly curtailed by statute. *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). See also *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). Making the death sentence mandatory in all cases where some aggravating and no mitigating factors are present would not curtail sentencer discretion to the same degree as the statutes condemned in *Woodson* and *Roberts*, nor in the same manner as the statute invalidated in *Lockett*. Nonetheless such a law would prevent sentencers from declining to impose the death sentence in many cases where the particular facts, though technically within the statutory aggravating criteria, do not in the sentencer's judgment present sufficient indicia of malice, dangerousness, or other evil to justify the ultimate punishment. Whether such a restriction on sentencer discretion is constitutional may soon be decided by the Supreme Court. See *Zant v. Stephens*, *supra*. I will not attempt to predict the holding of the Court on this issue. Suffice it to say that the constitutional difficulties presented by this interpretation of the Florida statute are significant enough that we should not attribute such interpretation to the state court without a clear statement to that effect on its part.⁴³ *Cf. id.* (certifying case

(Fla. 1977), as the seminal Florida Supreme Court case discussing the application of the harmless error rule to erroneously considered aggravating factors. The *Elledge* court reasoned that improper aggravating factors could have affected the initial sentencing decision

to Supreme Court of Georgia for description of state law premises of similar statement by Georgia court).

If the Florida court's statement is interpreted as a presumption to be applied at the review stage that death is appropriate whenever the sentencer has found some aggravating and no mitigating factors, such state law rule also suffers a constitutional infirmity. As I have already noted, see text *supra* at 848, meaningful appellate review is a constitutionally required element of capital sentencing schemes. Engaging in the presumption just described falls far short of the type of review that will ensure rationality and consistency in sentencing. Where a judge or jury disregards or misinterprets the procedures or criteria established by the state's sentencing scheme, the regularity and objectivity in sentencing that the statute is designed to accomplish is defeated. Once such an error has been made, however, there are different possible approaches to correcting it. As the former Fifth Circuit recognized in *Henry v. Wainwright*, *supra* and *Stephens v. Zant*, *supra*, not all such approaches meet the requirements of the eighth amendment. Superimposing on defective sentencing a review procedure under which the appellate court, having identified the sentencer's error, then speculates or presumes what the sentencer would have done had the error not been made compounds rather than resolves the problem and is clearly inconsistent with *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). The Supreme Court also has recognized the infirmity of such a review process. *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978) (per curiam) (imposition of death sentence violated due process

where state supreme court rejected jury's grounds for sentence but affirmed sentence on ground that evidence supported theory not relied on by jury); *Cole v. Arkansas*, 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948) (state supreme court's affirmation of convictions on basis of statutory provision other than that to which proof was directed at trial deprived defendant of due process). Cf. *Eddings v. Oklahoma*, 455 U.S. 101, 117-19, 102 S.Ct. 869, 877-79, 71 L.Ed.2d 1, 13-14 (1982) (O'Connor, J., concurring) (where it appears trial judge believed he could not consider mitigating evidence, Court will not speculate as to whether he did consider it but found it insufficient; "*Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976)] and *Lockett v. Ohio*, 438 U.S. 556, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978)] require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the court").

Presnell v. Georgia establishes that a fundamental element of due process of law is the right to be sentenced by the trial level trier of fact who has heard the proof. "To conform to due process of law, petitioner[] [was] entitled to have the validity of [his] [sentence] appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Presnell*, 439 U.S. at 16, 99 S.Ct. at 236, quoting *Cole v. Arkansas*, 333 U.S. 196, 202, 68 S.Ct. 514, 517, 92 L.Ed. 644 (1948). Indeed, the law has appeared clear that "only the trier of fact may impose a death sentence." *Willis v. Balkcom*, 451 U.S. 926, 101 S.Ct. 2003, 68 L.Ed.2d 315 (1981) (Marshall, Brennan & Stewart, JJ., dissenting from denial of certiorari). If the trial court declines to im-

only if the sentencer found some mitigating factor(s). *Id.* at 1002-03. The court's suggestion that the "weighing process" takes place only if the sentencer finds both aggravating and mitigating factors, see *id.* at 1003, implies that the statute does not allow the sentencer to evaluate the sufficiency of aggravating factors in cases where it finds no mitigating factors. But cf. *Williams v. State*, 396 So.2d 538, 543 (Fla.1980) (reversing death sentence predicated partially on invalid aggravating factors despite presence of one valid aggravating factor and no

mitigating factors because jury recommended life sentence). The court's holding in *Williams* indicates that the advisory jury may, consistently with the Florida sentencing statute, decline to impose the death penalty if it views the aggravating factors as insufficient to justify such sentence. See *id.* at 543. See also *Demps v. State*, 395 So.2d 501, 506 (Fla.1981) (trial judge may "tak[e] into consideration the quality of aggravating circumstances applicable to each defendant").

pose the death penalty, the appellate court constitutionally could not impose the death sentence on its own initiative on appeal. The same logic requires that the death penalty be affirmed only for the reasons on which the trial court relied in imposing the sentence. *Presnell v. Georgia*, 439 U.S. at 15-16, 99 S.Ct. at 235-36. Whether or not the appellate court perceives that the ultimate penalty could have been imposed on less than all the circumstances presented to the lower court, the appellate court is not empowered to impose the death sentence on the basis of those lesser circumstances. The crucial question in reviewing a death sentence when some of the circumstances relied on by the lower court are invalidated is not whether the trier of fact constitutionally could have, but whether it would have imposed the death penalty on the basis of those lesser circumstances. Because the question of what the trier of fact would have done can not be answered by an appellate body in any consistent and reliable manner but only through pure speculation, in these circumstances affirmance of the death penalty by the appellate court violates the reliability and consistency requirements of the eighth amendment. See, e.g., *Eddings v. Oklahoma*, 455 U.S. at 117-19, 102 S.Ct. at 877-879, 71 L.Ed.2d at 12, 13-14 (O'Connor, J., concurring); *Lockett v. Ohio*, 438 U.S. at 604, 98 S.Ct. at 2964 (plurality opinion); *Gardner v. Florida*, 430 U.S. at 359-60, 97 S.Ct. at 1205-06 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 363-64, 97 S.Ct. at 1207 (White, J., concurring); *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2991 (opinion of Powell, Stewart & Stevens, JJ.); *Gregg v. Georgia*, 428 U.S. at 188, 96 S.Ct. at 2932 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 207, 220-24, 96 S.Ct. at 2941, 2947-49 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Jurek v. Texas*, 428 U.S. at 276, 96 S.Ct. at 2958 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 277, 278-79, 96 S.Ct. at 2958, 2959-60 (White & Rehnquist, JJ. & Burger, C.J., concurring); *Proffitt v. Florida*, 428 U.S. at 252-53, 258-59, 96 S.Ct. at 2966-67, 2969-70 (opinion of Powell, Stewart & Stevens, JJ.); *id.* at 260-61, 96 S.Ct. at 2970

(White & Rehnquist, JJ. & Burger, C.J., concurring); *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

When it is found on appellate review that any of the aggravating factors on which the trial court relied in initially imposing the death sentence are invalid, the appellate court has no method by which to determine whether those factors were the ones to tip the initial sentence's decision in favor of the death penalty. Even when only one circumstance is invalidated on appeal a reviewing court is not equipped to judge the actual significance to a trial judge or jury of that one, now invalid, factor. To speculate as to the degree of significance violates not only the mandate of the eighth amendment as interpreted in *Furman* and its progeny but also the due process right actually to be sentenced by the trial level judge or jury. *Presnell v. Georgia*, 439 U.S. at 16, 99 S.Ct. at 236.

The posture of this case is identical to, and therefore poses the same problem raised by, *Henry* and *Stephens*. As the majority points out, the trial courts' errors with respect to aggravating factors in *Henry* and *Stephens* were different than those involved here. In my view the difference is not significant. See text *supra* at 865-866. Moreover, the decisions in *Henry* and *Stephens* to remand for resentencing were not predicated on the nature of the trial courts' errors. Rather, the courts in those cases were concerned with the procedural regularity in capital sentencing that *Furman* held is mandated by the eighth amendment. The Fifth Circuit's resolution of the *Henry* and *Stephens* cases was based directly on the requirement of *Furman* that juries' discretion in capital sentencing be guided by objective and rationally reviewable standards. In both of those cases the state appellate courts had found valid aggravating circumstances in addition to unconstitutional ones, and no mitigating factors were present. The Fifth Circuit refused to affirm the death sentences on the basis of the valid aggravating factors, however. It reasoned that even though the juries could rationally have recommended the death sen-

tence on the basis of the permissible factors they had considered, there was no way for the court retrospectively to determine whether they would in fact have done so had they been properly instructed. An attempt to second-guess the jury, in the court's view, was not the proper role of the reviewing court but was "the antithesis of the rational review of the jury's application of clear and objective standards contemplated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny."⁴⁶

By attempting to distinguish this case from *Henry* and *Stephens* the majority confuses the requirement of *Furman* that capital sentencing be structured by procedures and criteria that are rationally reviewable with the requirements of other cases imposing substantive constitutional limitations on such criteria.⁴⁷ I do not suggest that every question of statutory interpretation involving capital sentencing criteria necessarily implicates the Federal Constitution. On the contrary, it is the procedure here employed by the state court, and not its substantive decision, that in my view raises a constitutional issue.

46. *Henry v. Wainwright*, supra, 661 F.2d at 60 n. 8 (citing *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)). The *Henry* panel rejected the reasoning of the Florida court that the sentence would be affirmed as long as no mitigating circumstances were found because "there is no danger that the unauthorized [aggravating] factor tipped the scale in favor of death." *Henry v. Wainwright*, 661 F.2d at 59. *Henry* held that the reviewing court's role in capital sentencing was not to second-guess the motives of the jury in recommending the death penalty.

Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to discern whether the nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more.

Id. at 60.

Similarly, in *Stephens* the court held the sentence unconstitutional because it was "impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional stat-

The Supreme Court recently has granted certiorari in *Barclay v. Florida*, 411 So.2d 1310 (Fla.1982), cert. granted, — U.S. —, 103 S.Ct. 340, 74 L.Ed.2d — (1982), on the question of whether consideration of a nonstatutory aggravating circumstance and aggravating factors allegedly unsupported by the evidence requires resentencing. In my view this court should defer decision of petitioner's aggravating circumstances claim pending the Supreme Court decisions in *Stephens* and in *Barclay*. Barring a contrary ruling by the Court in these cases, I would hold that the rational review requirement of *Furman* compels resentencing in instances, such as this one, in which the sentencer has misapplied the state's capital sentencing criteria.

Conclusion

Petitioner's eighth and fourteenth amendment rights have been violated by the Florida Supreme Court's consideration of nonrecord information and the trial court's erroneous instructions on mitigating circumstances. The trial court's reliance on improper evidence and legal theories in support of aggravating circumstances also violated his constitutional rights and may compel resentencing. See note 41 *supra*. Ac-

utory aggravating circumstance." *Stephens v. Zant*, 631 F.2d at 406. The constitutional deficiency in the sentence was not only that "the jury's discretion here was not sufficiently channelled," but also "that the process in which the death penalty was imposed in this case was not 'rationally reviewable.'" *Id.* at 406. See also *id.* (as modified by 648 F.2d 446).

47. *E.g., Edmund v. Florida*, — U.S. —, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (eighth amendment prohibits imposition of death penalty on defendants who aid and abet felony during which murder occurs but do not themselves kill or intend that killing take place); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (aggravating criterion that offense was "outrageously or wantonly vile, horrible, or inhuman" unconstitutional as applied to crime reflecting no more "depravity" of mind than that of anyone guilty of murder); *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (aggravating circumstances will not justify death sentence where such penalty is disproportionate to offense).

cordingly, subject only to the Supreme Court's decisions in *Stephens* and *Barclay*, I would remand this case to the district court with instructions to issue the writ of habeas corpus unless the state court grants petitioner a new sentencing proceeding followed by meaningful review in the state supreme court based solely on evidence in the record.

JOHNSON, Circuit Judge, concurring in part and dissenting in part:

[3, 6-15] While Judge Kravitch has analyzed and critiqued Sections I and III of the majority opinion in a most comprehensive manner, I write separately to emphasize the bases for my objections to these portions of the majority opinion.

The petition before us presents undenied allegations that the Florida Supreme Court considered nonrecord psychiatric, psychological, and post sentence reports on the direct appeal of petitioner's conviction and sentence. The Florida Supreme Court has admitted the practice but has attempted to justify its actions by drawing a fine distinction between capital sentence "review" as defined by state law and constitutionally required "supervisory standards" imposed by the United States Supreme Court. *Brown v. Wainwright*, 392 So.2d 1327, 1333 & n. 17 (Fla.), cert. denied, 454 U.S. 1000, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). In *Brown* the Florida court asserted that "non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review.'" 392 So.2d at 1332-33. Yet at the same time the court, citing *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), stated that "[t]he 'tainted' information we are charged with reviewing was . . . in every instance obtained to deal with newly-articulated procedural standards." *Id.* at 1333 n. 17. These "procedural standards," the court admitted, ". . . are required to make the statute operate in a constitutional manner." *Id.* It is clear, therefore, from the *Brown* opinion

that the Florida Supreme Court has considered nonrecord material on direct appeal in capital cases for the purpose of complying with requirements of the United States Constitution. The court's failure to make the appellants aware of the use of this information, and to afford them a reasonable opportunity to challenge or explain any portion of it, however, is a clear abrogation of its duty under the Constitution.

The majority simply cannot avoid the direct implication of *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in which the Supreme Court invalidated a death sentence imposed in part on information contained in an undisclosed presentence report. A majority of the Justices in *Gardner* agreed that a trial court's reliance on unrevealed information clearly violates the constitutional standards required for capital sentencing. The plurality opinion concluded that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause." 430 U.S. at 358, 97 S.Ct. at 1204 (Stevens, J.). Thus, the Florida Supreme Court's practice of reviewing nonrecord materials on direct appeal runs afoul of the Due Process Clause—viewed either independently or as "the vehicle by which the strictures of the Eighth Amendment are triggered. . . ." *Id.* at 364, 97 S.Ct. at 1207 (White, J., concurring). The same conclusion applies to direct review of death sentences by the Florida Supreme Court.

Direct review of capital sentences to safeguard against arbitrary and capricious sentencing is an essential element in the constitutional imposition of the death sentence. See, e.g., *Gregg v. Georgia*, 428 U.S. 153, 198, 96 S.Ct. 2909, 2936, 49 L.Ed.2d 859 (1976) (plurality) (The provision for appellate review in the Georgia capital sentencing system serves as a check against the random or arbitrary imposition of the death penalty.); *Proffitt v. Florida*, 428 U.S. 242, 253, 96 S.Ct. 2960, 2967, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 276, 96 S.Ct. 2950, 2958, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325,

335 n. 11, 96 S.Ct. 3001, 3007 n. 11, 49 L.Ed.2d 974 (plurality) (striking down the death statute in part because it did not provide for "judicial review to safeguard against capricious sentencing determinations"). Direct capital sentence review by the Florida Supreme Court is even more integral to the capital sentencing process of Florida than it is in other states. In upholding the facial constitutionality of the Florida death penalty in *Proffitt*, the Supreme Court emphasized the Florida Supreme Court's role as independent evaluator of the evidence in a system that attempted "to assure that the death penalty will not be imposed in an arbitrary or capricious manner." 428 U.S. at 252-53, 96 S.Ct. at 2966. "[T]o the extent that any risk . . . [of arbitrary or capricious sentencing] exists, it is minimized by Florida's appellate review system, under which the evidence of the aggravating and mitigating circumstances is reviewed and reweighed by the Supreme Court of Florida 'to determine independently whether the imposition of the ultimate penalty is warranted.'" 428 U.S. at 253, 96 S.Ct. at 2967 (quoting *Songer v. State*, 322 So.2d 481, 484 (Fla.1975), vacated on other grounds, 430 U.S. 952, 97 S.Ct. 1594, 51 L.Ed.2d 801 (1977)). In performing its review function the Florida Supreme Court "evaluate[s] anew the aggravating and mitigating circumstances of the case to determine whether the punishment is appropriate." *Harvard v. State*, 375 So.2d 833, 834 (Fla.1977), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979).

The statute contemplates that the trial jury, the trial judge and this Court will exercise reasoned judgment as to what factual situations require the imposition of death and which factual situations can be satisfied by life imprisonment in light of the totality of the circumstances present in the evidence. Certain factual situations may warrant the infliction of capital punishment, but, nevertheless, would not prevent either the trial jury, the trial judge, or this Court from exercising reasoned judgment in reducing the sentence to life imprisonment.

Alvord v. State, 322 So.2d 533, 540 (Fla. 1975) (emphasis added). The Florida Supreme Court regularly reevaluates the evidence in death penalty cases either to sustain the sentence or to reverse it on a factual basis overlooked by the trial court. See, e.g., *Mines v. State*, 390 So.2d 332 (Fla.1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1994, 68 L.Ed.2d 308 (1981); *Kampff v. State*, 371 So.2d 1007, 1010 (Fla.1979); *Shue v. State*, 366 So.2d 387, 389-90 (Fla. 1978); *Huckaby v. State*, 343 So.2d 20, 33, 34 (Fla.), cert. denied, 434 U.S. 920, 98 S.Ct. 393, 54 L.Ed.2d 276 (1977); *Harvard v. State*, supra; *Jones v. State*, 332 So.2d 615, 619 (Fla.1976); *Songer v. State*, supra; *Taylor v. State*, 294 So.2d 648, 651 (Fla. 1974).

Death sentence review by the Florida Supreme Court, therefore, affects the "substantial rights" of the defendant, who is entitled to at least a minimum of due process protection. *Mempa v. Rhay*, 389 U.S. 128, 134, 88 S.Ct. 254, 256, 19 L.Ed.2d 336 (1967). In order for the Florida Supreme Court to review the imposition of the death sentence with "rationality and consistency," *Proffitt*, supra, 428 U.S. at 259, 96 S.Ct. at 2969, defendants and their counsel must be aware of all the material under consideration by the court. Not only is the defendant's right to counsel implicated, *Anders v. California*, 386 U.S. 738, 742, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967), but so is the right of confrontation. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965); *Douglas v. Alabama*, 380 U.S. 415, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965). The receipt of psychiatric and psychological reports from the Department of Corrections also implicates a defendant's Fifth Amendment rights. *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981) (recognizing Fifth Amendment right to be informed of right to remain silent, to have questions cease, and to consult with an attorney before being subjected to psychiatric examination that may be used against defendant in capital sentencing proceedings). By considering nonrecord information without these safeguards the Florida Supreme Court has jeopardized the "degree of reli-

bility" and rationality required in the administration of the death penalty. *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 303-04, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976).

It does not matter that the Florida Supreme Court may have sought the nonrecord material for the purpose of complying with "newly-articulated [constitutional] procedural standards," such as those announced in *Lockett v. Ohio*, *supra*, and *Gardner v. Florida*, *supra*. The Florida Supreme Court itself recognized that these "procedural standards" are "required to make the statute operate in a constitutional manner." *Brown v. Wainwright*, *supra*, 392 So.2d at 1333 n. 17. Even this explanation for soliciting the information, however, is not fully satisfactory. The petitioner contends, and the state has not denied, that the Florida Supreme Court began soliciting nonrecord material as early as 1975. *Gardner* and *Lockett* were decided by the United States Supreme Court in 1977 and 1978.

It is important to note that the Florida Supreme Court has never denied considering nonrecord material of the kind alleged in this case. Instead, the court merely attempted to draw a legal distinction between the statutory "review" process and constitutionally required "supervisory standards." The majority's acceptance of this distinction, in my opinion, is nothing more than the adoption of a legal conclusion expressed by the Florida Supreme Court. Even when the court in *Brown* stated that "non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel plays no role in capital sentence 'review,'" 392 So.2d at 1332-33, the court was only articulating its statutorily imposed duty. It was not stating its actual practice. For this reason I find it unnecessary to discuss the "presumption of regularity" relied on in part by the majority.

I do not wish to imply that the Florida Supreme Court has been dishonest or has attempted to "cover-up" the facts. The point of this dissent is that it is constitu-

tionally unacceptable for this Court to affirm the denial of a writ of habeas corpus when the Florida Supreme Court has admitted considering nonrecord material for the purpose of complying with the United States Constitution. In addition, the risk is great that information requested for one purpose will even unintentionally be used in connection with another. That risk, in the context of the death penalty, and in the face of an ambiguous explanation, is constitutionally unacceptable. See *Lockett v. Ohio*, *supra* at 604, 98 S.Ct. at 2964. (The "difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed."); *Gardner v. Florida*, *supra*, 420 U.S. at 364, 97 S.Ct. at 1207 (White, J., concurring) ("A procedure for selecting people for the death penalty which permits consideration of secret information relevant to the 'character and record of the individual offender,'

fails to meet the 'need for reliability in the determination that death is the appropriate punishment' . . ." (quoting *Woodson v. North Carolina*, *supra*, 428 U.S. at 304, 305, 96 S.Ct. at 2991)). The Florida Supreme Court's role in the direct review of death sentences is of such importance that it may not choose to solicit psychiatric, psychological, and other reports without the knowledge of the defendant, and without giving defendant or his counsel an opportunity to comment on or challenge the information in the reports. Because the alleged violations in this case have gone undenied, and because the Florida Supreme Court has admitted soliciting nonrecord material as a matter of practice, in my judgment the only way to remedy this violation would be to direct the district court to grant the writ conditionally. The writ would become final in the event that the Florida Supreme Court does not grant petitioner a new direct review of his conviction and sentence. Either the new review must be undertaken completely without the benefit of nonrecord material, or, if the court decides to continue its practice, the new review must give petitioner and his counsel adequate notice of the use of nonrecord information, with adequate opportunity to comment on and challenge the material.

However, in my judgment the majority commits a more serious error than that of stamping its approval on the review given this case by the Florida Supreme Court. The majority has grievously erred by not requiring the full resentencing of petitioner as a result of the invalidity of three statutory aggravating factors considered by the jury and relied on by the judge. The petitioner is entitled to a full resentencing procedure in this case because the consideration of and reliance on invalid aggravating factors in the face of substantial evidence of mitigating factors resulted in a situation in which the presence of the invalid factors could have tipped the scales against the petitioner. By adding three impermissible "weights" to the weighing process, the sentencing discretion of the jury and the judge was not properly channeled to eliminate the risk of arbitrary, capricious, or disproportionate results. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980). In addition, the petitioner's right to have the jury and judge fully consider all mitigating evidence in his behalf, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), was substantially diminished by the presence of "overloaded" aggravating factors. Not only was the sentencing process significantly affected by the presence of invalid factors, but the sentence itself was not "rationally reviewable" by the Florida Supreme Court. *Woodson v. North Carolina*, 428 U.S. 280, 303, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976). Moreover, after an error of this kind has been made, it is completely impermissible for the Florida Supreme Court, and now this Court, to usurp the role of sentencer by guessing as to how the jury and the judge would have decided the case in the absence of the invalid aggravating factors.

The Florida Supreme Court's original rationale for upholding a death sentence which rests partially on invalid aggravating factors was that, in the presence of at least one valid aggravating factor and in the absence of any mitigating factors, "death is presumed to be the appropriate penalty."

Ford v. State, 374 So.2d 496, 503 (Fla.1979), cert. denied, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980); *Elledge v. State*, 346 So.2d 998 (Fla.1977); *State v. Dixon*, 283 So.2d 1 (Fla.1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). The rationale was apparently modified to some extent in *Brown v. State*, 381 So.2d 690 (Fla.1980), cert. denied, 449 U.S. 1118, 101 S.Ct. 931, 66 L.Ed.2d 847 (1981), which held that the presence of a mitigating factor, characterized by the trial judge as of "some minor significance," was not sufficient to require resentencing in the face of the invalidity of an aggravating factor, when sufficient aggravating factors remained so that the court could know that the weighing process had not been compromised by the consideration of the invalid aggravating factors. *Id.* at 696.

The danger of the *Brown* approach becomes evident in this case, however, in that the Florida Supreme Court has essentially taken over the role of sentencer. At the sentencing hearing the petitioner not only presented the statutory mitigating factor of his age (20), but also presented substantial evidence of prior good character and loyal family commitment. The petitioner argues that he had only recently become involved in crime as a result of losing his last job, and a recent involvement with drugs. Instead of remanding the case so that the jury could properly reconsider and reweigh this mitigating evidence against the valid aggravating factors, the Florida Supreme Court took it upon itself to conclude that "the proper sentence is the death penalty." 374 So.2d at 503 (emphasis added). The Florida Court clearly imposed its own view of the proper outcome over that of the sentencing authority. Even if the jury and judge were to reach the same result on remand, it is error to substitute an appellate court decision for that of the trial court sentencing authority. Otherwise, there would have been no need ever to have empaneled the jury, or to submit the jury's recommendation to the judge for findings.

By substituting its own view of the evidence for that of the jury and the judge,

the Florida Supreme Court disregards the fundamental premise of *Proffitt*, *supra*, that it is first of all the jury's, and then the judge's duty to consider "[w]hether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and ... [b]ased on these considerations, whether the defendant should be sentenced to life or death." Fla. Stat. Ann. §§ 921.141(2)(b), (c), quoted in *Proffitt v. Florida*, *supra*, 428 U.S. at 248, 96 S.Ct. at 2964. Only after the jury and the judge have properly considered the evidence may the state supreme court "review" and "reweigh" the evidence. *Proffitt*, *supra* at 253, 96 S.Ct. at 2967. The initial jury decision, even though it is advisory, substantially affects the burden of proof to be applied by the trial judge and standard of review on appeal. "In order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975); quoted in *Proffitt v. Florida*, *supra*, 428 U.S. at 249, 96 S.Ct. at 2965. Thus it is essential that the weighing process be first undertaken by the jury, then by the judge, and only later by the Florida Supreme Court. To do otherwise is not only to introduce elements of unreliability, but to upset the "rationality and consistency" of death sentence administration. *Proffitt*, *supra*, 428 U.S. at 259, 96 S.Ct. at 2969.

In addition, the failure to require full resentencing after invalidating three aggravating factors abrogates the substance of petitioner's rights under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982). In *Lockett* the Supreme Court held that the Eighth Amendment requires that the sentencer "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604, 98 S.Ct. at 2964 (emphasis in original). In *Eddings*

the Court held that "Just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer, refuse to consider, as a matter of law, any relevant mitigating evidence." 455 U.S. at 113, 102 S.Ct. at 875 (emphasis in original). The Supreme Court concluded that "... state courts must consider all relevant mitigating evidence and weigh it against the evidence of the aggravating circumstances." *Id.* The jury and judge in this case could not have effectively weighed the evidence of petitioner's character and personal record when the state had improperly placed three invalid "weights" on the same set of scales. See *Enmund v. Florida*, — U.S. —, —, 102 S.Ct. 3368, 3394, 73 L.Ed.2d 1140 (1982) (O'Connor, J., dissenting) ("Although the state statutory procedures did not prevent the trial judge from considering any mitigating circumstances, the trial judge's view of the facts, in part rejected by the state supreme court, effectively prevented such consideration."). Accordingly, the proper disposition of this case would require resentencing by both jury and judge.

For these reasons I dissent from Sections I and III of the majority opinion.

R. LANIER ANDERSON, Circuit Judge, concurring in part and dissenting in part, joined by CLARK, Circuit Judge, concurring as to Section B:

A.

I concur in Part VI (Florida Supreme Court's Standard of Review) and Part VII (Assistance of Counsel at Sentencing) of Judge Roney's opinion for the majority. I concur in the result only in Part II (Instruction on Mitigating Circumstances) and Part IV (Admission of Ford's Oral Confession). I join the dissenting opinions of Chief Judge Godbold, Judge Johnson and Judge Kravitch with respect to Part I (*Brown* Issue). With respect to Part III (Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances), I would certify this issue to the Florida Supreme Court, agreeing with most

of what Judge Tjoflat has written in this regard.

B.

I respectfully dissent from Part V of the majority opinion, relating to the appropriate standard of proof. I find merit in Ford's argument that the sentencing body must be convinced beyond a reasonable doubt that the mitigating circumstances are insufficient to outweigh aggravating circumstances.¹

It is important to note at the outset that the reasonable doubt standard has been recognized in the context of the ordinary criminal trial as a matter of fundamental fairness. *In Re Winship*, 397 U.S. 358, 363, 90 S.Ct. 1068, 1072, 25 L.Ed.2d 368 (1970), the absence of which "substantially impairs the truth-finding function." *Ivan V. v. City of New York*, 407 U.S. 203, 205, 92 S.Ct. 1951, 1952, 32 L.Ed.2d 659 (1972).

Ford's argument, that the factfinder must be convinced beyond a reasonable doubt that the aggravating circumstances outweigh the mitigating circumstances, presents a novel question. The most forceful reason² given by the majority in rejecting the argument is its assertion that the process of weighing is not "susceptible to proof by either party." The majority suggests that the sentencing body is required only to consider and weigh the several ag-

gravating and mitigating factors, which thus guide and channel the sentencing function. The majority makes an implicit comparison to the traditional sentencing function where the trial judge weighs numerous factors and selects a sentence from among a wide range of options, e.g., a ten year sentence selected from a permissible range of zero to fifteen years. No one would suggest that the trial judge, in such traditional sentencing, can consider only subsidiary facts which are proven beyond a reasonable doubt, nor that the specific sentence selected, as opposed to one of several years more or several years less, must be justified beyond a reasonable doubt.

However, I respectfully suggest that the sentencing process in a death case is qualitatively different from traditional sentencing. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion). As a result, the Supreme Court has made it clear that special procedures must govern the sentencing process in a death case. Among those special procedures, Florida has provided for a bifurcated hearing on sentencing which resembles the original trial in many respects, including the requirement that certain findings of fact must be made if the death sentence is to be imposed. See *Bull-*

1. Ford also argues that the existence of the statutory aggravating circumstances themselves must be proved beyond a reasonable doubt. I agree with Judge Roney that state law does require proof beyond a reasonable doubt of the existence of such aggravating circumstances. *State v. Dixon*, 283 So.2d 1, 9 (Fla. 1973). In my opinion, the reasoning developed in the text below also compels the same result as a matter of constitutional due process. However, I agree with Judge Roney that the facts of this case, with respect to the existence of the aggravating circumstances, are undisputed, and therefore that we can conclude that the failure to apply the proper reasonable doubt standard to those undisputed facts is harmless beyond a reasonable doubt.

I also agree with Judge Tjoflat that *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), would bar Ford's reliance on the principle that the existence of aggravating circumstances must be proved beyond a reasonable doubt. There was a procedural de-

fault because Ford did not object at trial. Because the facts relating to the aggravating circumstances were largely undisputed, there was no actual prejudice to Ford, and therefore the *Sykes* cause and prejudice standard is not satisfied.

2. The majority opinion also asserts, as a reason for rejecting Ford's argument, the fact that the Supreme Court has declared the Florida Statute constitutional on its face. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976) (plurality opinion). I respectfully point out that *Proffitt* did not address the issue now before this court, i.e., whether due process requires the reasonable doubt standard of proof. *Proffitt* expressly addressed only "whether the imposition of the death sentence in this case constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." *Id.*, at 247, 96 S.Ct. at 2964.

ington v. Missouri, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). Thus, the Florida sentencing phase is significantly different from the majority's conception of a mere consideration of enumerated aggravating and mitigating factors. The Florida statute expressly requires that certain prerequisite findings of fact be made:

Findings in support of sentence of death.

— ... the court ... shall set forth its findings upon which the sentence of death is based as to the facts:

(a) That sufficient aggravating circumstances exist ... and

(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Fla.Stat. § 921.141(3) (emphasis added). The statutory scheme expressly provides that the determination of whether aggravating circumstances outweigh mitigating circumstances is a finding of fact.

This construction of the Florida statute is supported by *Bullington v. Missouri*, 451 U.S. 430, 101 S.Ct. 1852, 68 L.Ed.2d 270 (1981). There the Supreme Court, in another context, recognized the significant difference between the sentencing process in a death case and traditional sentencing:

The procedure that resulted in the imposition of the sentence of life imprisonment upon petitioner Bullington at his first trial, however, differs significantly from those employed in any of the Court's cases where the Double Jeopardy Clause has been held inapplicable to sentencing. The jury in this case was not given unbounded discretion to select an appropriate punishment from a wide range authorized by statute. Rather, a separate hearing was required and was held, and the jury was presented both a choice between two alternatives and standards to guide the making of that choice. Nor did the prosecution simply recommend what it felt to be an appropriate punishment. It undertook the burden of

establishing certain facts beyond a reasonable doubt in its quest to obtain the harsher of the two alternative verdicts. The presentence hearing resembled and, indeed, in all relevant respects was like the immediately preceding trial on the issue of guilt or innocence. It was itself a trial on the issue of punishment so precisely defined by the Missouri statutes.

In contrast, the sentencing procedures considered in the Court's previous cases did not have the hallmarks of the trial on guilt or innocence. In *Pearce*,³ *Chaffin*,⁴ and *Stroud*,⁵ there was no separate sentencing proceeding at which the prosecution was required to prove—beyond a reasonable doubt or otherwise—additional facts in order to justify the particular sentence. In each of the cases, moreover, the sentencer's discretion was essentially unfettered. In *Stroud*, no standards had been enacted to guide the jury's discretion. In *Pearce*, the judge had a wide range of punishments from which to choose with no explicit standards imposed to guide him. And in *Chaffin*, the discretion given to the jury was extremely broad.

451 U.S. at 438-39, 101 S.Ct. at 1858 (footnotes in original omitted) (emphasis added). See also *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976).

Bullington demonstrates that the sentencing phase of a death case is significantly different from traditional sentencing, because the fact finder must choose between only two alternative penalties and because additional findings must be made to justify the death sentence. I submit that the majority has erred in perceiving the Florida scheme as a mere consideration of aggravating and mitigating factors, analogous to

3. *North Carolina v. Pearce*, 395 U.S. 711, 89 S.Ct. 2072, 23 L.Ed.2d 656 (1969).

4. *Chaffin v. Stynchcombe*, 412 U.S. 17, 93 S.Ct. 1977, 36 L.Ed.2d 714 (1973).

5. *Stroud v. United States*, 251 U.S. 15, 40 S.Ct. 50, 64 L.Ed. 103 (1919).

traditional sentencing; the Florida statute expressly requires two crucial findings of fact,⁶ that sufficient aggravating circumstances exist and that there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

Implicit in the majority position is a further argument to the effect that even though the issue involves a finding, nevertheless it is a finding which results from the process of weighing subsidiary facts and it is a finding which involves a large measure of subjective judgment on the part of the fact finder. Such a finding, the majority apparently reasons, is not susceptible to proof under any objective standard. The fallacy of the argument, however, lies in the failure to perceive the standard of proof in terms of the level of confidence which the fact finder should have in the accuracy of his finding:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication."

Addington v. Texas, 441 U.S. 418 at 423, 99 S.Ct. 1804 at 1807, 60 L.Ed.2d 323 (1979)

6. I agree with Judge Tjoflat, Opinion of Tjoflat, Circuit Judge, at 831 n. 17, that the process of weighing aggravating circumstances should more properly be labeled a normative, policy decision based on findings of subsidiary facts and the exercise of a large measure of judgment. Thus, I agree that the Florida statute is less than precise when it expressly labels this finding as one of fact. However, I also agree with Judge Tjoflat that the label is not significant and that it is appropriate to apply a standard of confidence, i.e., to require that the judge or jury have a high degree of confidence in the accuracy of their conclusion. The importance of the above discussion of the Florida statute and *Bullington* is not that findings of fact are required in the sentencing phase, but rather that certain articulated findings (whatever the label) are prerequisites. As demonstrated in the text below, it is both possible and necessary to apply a standard of confidence to this finding, whether it is called a finding of fact or a finding which involves a large measure of judgment or policy.

(emphasis added) (quoting from *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970) (Harlan, J., concurring at 370, 90 S.Ct. at 1075)). The crux of my dissent is that it is both possible and necessary that the judge and jury have a high degree of confidence in the accuracy of the finding that the death penalty is warranted. The crucial difference between the majority and me is that the majority assumes that it is not possible or appropriate to apply any standard. I respectfully submit that the above quotation from *Addington* demonstrates that the Supreme Court has applied a standard of confidence in an analogous context. *Accord*, *Santosky v. Kramer*, — U.S. —, —, 102 S.Ct. 1388, 1393, 71 L.Ed.2d 599 (1982).

I see no logical obstacle to a jury instruction—or a legal requirement upon the trial judge—to the effect that the instant finding must be made beyond a reasonable doubt, i.e., that the fact finder must have a high degree of confidence in the accuracy of the finding. To the contrary, many findings involve weighing of subsidiary facts and judgment similar to the instant finding. Indeed, the reasonable doubt standard is applied to comparable findings in the death penalty sentencing phase by numerous states as a matter of state law.⁷ On the

7. In fact, in Florida itself the reasonable doubt standard has been applied to weigh aggravating and mitigating circumstances. *Jackson v. State*, 366 So.2d 752, 757 (Fla.1978) (per curiam) (quoting from the trial judge's findings of fact: "The aggravating circumstances in this case purely outweigh beyond and to the exclusion of every reasonable doubt in the Court's mind the mitigating circumstances"), cert. denied, 444 U.S. 885, 100 S.Ct. 177, 62 L.Ed.2d 115 (1979). Cf. *Tedder v. State*, 322 So.2d 908, 910 (Fla.1975) (following a jury recommendation of life a trial judge can override the advisory jury and impose a sentence of death only upon facts suggesting a sentence of death so clear and convincing that virtually no reasonable person could differ).

In addition, several state legislatures, courts, and juries have used the reasonable doubt standard to determine whether the aggravating circumstances outweigh the mitigating circumstances. Ark.Stat. Ann. § 41-1302(2) (1977) (authorizes the jury to "impose a sentence of life imprisonment without parole if it finds that

(b) aggravating circumstances do not out-

other hand, my research has disclosed no case, other than Judge Roney's opinion in this case, which has addressed the finding at issue here and held that it is not "susceptible to proof under any standard."

In *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979), the Supreme Court applied the clear and convincing evidence standard to a similar finding, thus implicitly rejecting the majority's assumption that such findings are not susceptible to proof under any objective standard. At issue there was the proper standard of proof applicable to the findings required for involuntary commitment of mentally ill persons. One of the prerequisite findings was whether the person was dangerous to himself or others such that he required hospitalization. *Addington* is instructive in the instant case because the nature of the finding there is very similar to the finding required in this case. In gauging a mentally ill person's danger to himself or others, the fact finder must weigh subsidiary facts. For example, past instances of dangerous

behavior would be considered, as well as expert testimony concerning the nature of the person's illness, the possibilities that the illness could be controlled by drugs, the possibilities of recurrent episodes of the illness, and the likelihood of future instances of violence. The fact finder has to come to some conclusion as to the degree of dangerousness, and then weigh the danger to the person and society against the deprivation of liberty which involuntary commitment would entail; both require a large measure of judgment. The Supreme Court did not hesitate to require, as a matter of due process, that the fact finder have a high degree of confidence in the accuracy of its findings, i.e., the clear and convincing standard.

The instant finding—that aggravating circumstances sufficiently outweigh mitigating circumstances to justify the death sentence—is one similar in nature to that in *Addington*.

I acknowledge the complexity of the findings which are preconditions to the imposition of a sentence of death. This concu-

weight [sic] beyond a reasonable doubt all mitigating circumstances found to exist"; Ohio Rev.Code Ann. § 2929.03(D)(1) (Page 1982) ("The prosecution shall have the burden of proving, by proof beyond a reasonable doubt, that the aggravating circumstances the defendant was found guilty of committing are sufficient to outweigh the factors in mitigation of the sentence of death"); Wash.Rev.Code § 10-95.060(4) (Supp 1981) ("Upon conclusion of the evidence and argument at the special sentencing proceeding, the jury shall retire to deliberate upon the following question: 'Having in mind the crime of which the defendant has been found guilty, are you convinced beyond a reasonable doubt that there are not sufficient mitigating circumstances to merit leniency?'"); *State v. Wood*, 648 P.2d 71, 83-84 (Utah 1982) ("The sentencing body, in making the judgment that aggravating factors 'outweigh,' or are more compelling than, the mitigating factors, must have no reasonable doubt as to that conclusion, and as to the additional conclusion that the death penalty is justified and appropriate after considering all the circumstances"); *Redix v. State*, 381 So.2d 999, 1013 (Miss.1980) (quoting from the jury's verdict signed by the foreman: "We further find unanimously from the evidence and beyond a reasonable doubt that after weighing mitigating circumstances and the aggravating circumstances, one against the other, that the mitigating circumstances do not outweigh the aggravating circumstances and that the defendant should suffer the penal-

ty of death"), cert. denied, 449 U.S. 986, 101 S.Ct. 408, 66 L.Ed.2d 251 (1980); *Woodard v. State*, 261 Ark. 895, 553 S.W.2d 259, 266-67 (1977) ("The court in accordance with our statutes instructed the jury as follows: You may not return a verdict imposing the sentence of death unless you make written findings and conclusions . . . that beyond a reasonable doubt no mitigating circumstance or circumstances which you may find to exist outweigh or equals in weight the aggravated circumstance or circumstances"); cert. denied, 439 U.S. 1122, 99 S.Ct. 1034, 59 L.Ed.2d 83 (1979); *Edwards v. State*, — So.2d — (Ala.Cr.App., June 29, 1982) (available on LEXIS, States library, Omni file) (quoting from the trial court's order: "The court, having thoroughly considered the aggravating circumstances and mitigating circumstances and having carefully weighed both, is convinced beyond a reasonable doubt and to a moral certainty that the aggravating circumstances far outweigh the mitigating circumstances"); see *Bullington v. Missouri*, 451 U.S. 430, 434, 101 S.Ct. 1852, 1855, 68 L.Ed.2d 270 (1981) (under the Missouri Approved Instructions—Criminal § 15.42 (1979), a jury "must be convinced beyond a reasonable doubt that any aggravating circumstance or circumstances that it finds to exist are sufficient to warrant the imposition of the death penalty").

sion, however, relates not to whether to apply a standard of proof, but instead is relevant to which standard to apply. In *Addington*, for example, the Supreme Court expressed grave concern over the "uncertainties of psychiatric diagnosis," 441 U.S. at 432, 99 S.Ct. at 1812, remarking that such diagnosis is "to a large extent based on medical 'impressions' drawn from subjective analysis and filtered through the experience of the diagnostician." 441 U.S. at 430, 99 S.Ct. at 1811. Nonetheless, the *Addington* court acknowledged that the finding was susceptible to proof pursuant to a standard; rather the concern for the difficulty of the decision facing the fact finder was viewed as but one of several criteria to be considered by a court in determining which standard of proof satisfies the dictates of due process. In fact in its most recent case, *Santosky v. Kramer*, — U.S. —, —, 102 S.Ct. 1388, 1398, 71 L.Ed.2d 599 (1982), the Supreme Court relied upon the complexity of a finding as support for imposing a standard of proof higher than preponderance of the evidence. There the Court addressed the issue of what standard of proof is constitutionally required to support a finding of permanent neglect necessary to terminate parental rights. The "judgmental" and imprecise nature of the finding was deemed to magnify the chance of error, and therefore was a factor influencing the Court to require the clear and convincing standard of proof.

At such a proceeding, numerous factors combine to magnify the risk of erroneous factfinding. Permanent neglect proceedings employ imprecise subjective standards that leave determinations unusually open to the subjective values of the judge.

— U.S. at —, 102 S.Ct. at 1399 (emphasis added).

I respectfully submit that the majority is in error in its assumption that the instant finding is not susceptible to a standard of proof. *Addington* compels this conclusion.

Having concluded that some standard of proof is applicable to the instant finding, I turn to well established principles to deter-

mine which standard of proof is appropriate. *Santosky v. Kramer*, — U.S. at —, 102 S.Ct. at 1398; *Addington v. Texas*, 441 U.S. 418, 99 S.Ct. 1804, 60 L.Ed.2d 323 (1979); *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975); *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). The function of the standard of proof is to allocate as between the parties the risk of error. *Addington v. Texas*, 441 U.S. at 423, 99 S.Ct. at 1807; *In Re Winship*, 397 U.S. at 363-64, 90 S.Ct. at 1072. The determination of which standard to apply involves assessing interests which the individual has at stake and weighing those against the State's interests. *Addington v. Texas*, 441 U.S. at 425, 99 S.Ct. at 1808. These interests have been weighed in the ordinary criminal case as follows:

"Where one party has at stake an interest of transcending value—as a criminal defendant his liberty—this margin of error is reduced as to him by the process of placing on the other party the burden of . . . persuading the factfinder at the conclusion of the trial of his guilt beyond a reasonable doubt. Due process commands that no man shall lose his liberty unless the Government has borne the burden of . . . convincing the factfinder of his guilt."

In Re Winship, 441 U.S. at 364, 90 S.Ct. at 1072 (quoting from *Speiser v. Randall*, 357 U.S. 513, 525-26, 78 S.Ct. 1332, 1341, 2 L.Ed.2d 1460 (1958)).

When the interest which the individual has at stake is life itself, and when it is recognized that an erroneously imposed death sentence is ultimately final precluding any correction of the error, and when Supreme Court precedent establishes the reasonable doubt standard as appropriate in ordinary criminal cases, little discussion should be necessary to conclude that the death penalty should be imposed only when the fact finder is convinced beyond a reasonable doubt. Although I submit that the propriety of the reasonable doubt standard is near obvious, the importance of the issue requires that I belabor the discussion.

The analysis required by *Addington* weighs the interests which the defendant has at stake against those of the State. The defendant's interests are obvious. Life is more precious than liberty, and of course due process requires the reasonable doubt standard in the ordinary criminal case involving the mere deprivation of liberty. Death is final; an erroneously-imposed death sentence is irretrievable. No one can dispute the transcendent value of the defendant's interests in avoiding an erroneously-imposed death sentence.

To suggest a lesser standard (or no standard) is to argue that the State has a legitimate interest in imposing the death penalty when there is a reasonable doubt as to its propriety. The bare statement of the argument reveals that it is unacceptable. The State's interests involve the protection of society against the dangerous propensities of the particular defendant, deterrence and vengeance. Although the State's interests are legitimate and strong, they are satisfied in large measure whether or not the death penalty is imposed, because a life sentence is automatic if the death sentence is rejected. The State's interest in protecting society against this defendant could be discharged in full measure by providing for a life sentence without parole. While a finding which erroneously denies the death penalty may infringe to some degree on the State's interests in deterrence and revenge, the substituted life sentence serves these purposes in substantial degree. For example, those who contemplate committing capital crimes would face substantial deterrence in the knowledge that a sentencing body will impose the death penalty upon finding beyond a reasonable doubt that it is

warranted, and in lieu thereof will impose a life sentence.

As noted earlier in this opinion, *Addington* recognizes that the complexity and difficulty of a particular finding sometimes operates as a practical consideration which weighs against using the highest, reasonable doubt standard of proof. I doubt that the finding at issue here is riddled with "subtleties and nuances" and "fallibility" to quite the same degree as the psychiatric diagnosis at issue in *Addington*. Indeed the reasonable doubt standard has apparently worked in the instant context as a practical matter, as evidenced by the fact that the standard is used in numerous states. See footnote 7, *supra*. In any event, this practical consideration is only one factor in the *Addington* analysis, and in the instant context is overbalanced by the transcending value of the interests which a defendant has in avoiding the erroneous imposition of the death sentence.

Indeed, the Supreme Court has said:

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976) (plurality opinion by Stewart, Powell, and Stevens, JJ.) (footnote omitted) (emphasis added).⁸ Although the Supreme

8. Accord, *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (plurality opinion by Burger, Ch. J., Stewart, Powell and Stevens, JJ.) ("We are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Id.* at 604, 98 S.Ct. at 2964. "When the choice is between life and death, that risk [i.e., the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty] is unacceptable and incompatible with the commands of the Eighth and Fourteenth

Amendments." *Id.* at 605, 98 S.Ct. at 2965); *Gardner v. Florida*, 430 U.S. 349, 359, 363-64, 97 S.Ct. 1197, 1205, 1207, 51 L.Ed.2d 393 (1977). See also *Bullington v. Missouri*, 451 U.S. 430, 445, 101 S.Ct. 1852, 1861, 68 L.Ed.2d 270 (1981) (In holding that the Double Jeopardy Clause prevented a defendant from being sentenced to death when the jury at his first trial declined to impose the death sentence, the Court said: "The 'unacceptably high risk that the [prosecution] with its superior resources would wear a defendant down' ... thereby leading to an erroneously imposed death sen-

Court has not yet addressed the precise question of whether due process requires that the reasonable doubt standard be applied to the prerequisite findings in the sentencing phase of a death case, the Court has, in *Woodson* and numerous other cases, made clear its insistence on a high degree of reliability. Because the standard of proof is the prime instrument in allocating the risk of error and insuring reliability, the Supreme Court cases insisting on a high degree of reliability provide strong support for my position that the reasonable doubt standard is required.

In addition to the above discussed function of the standard of proof—i.e., allocation of the risk of error—Addington states another function: “to indicate the relative

tence would exist if the State were to have a further opportunity to convince a jury to impose the ultimate punishment.”)

9. In rejecting Ford's standard of proof arguments, the majority does not rely on Ford's apparent procedural defaults. In light of the concerns expressed in Judge Tjoflat's separate opinion, however, a brief comment is appropriate.

During the sentencing phase, Ford did not object to the failure of the trial court to instruct the jury as to the standard of proof to be used when determining whether aggravating factors outweigh mitigating factors. Thus, the state courts refused to address this claim. See *Ford v. State*, 407 So.2d 907, 908 (Fla.1981). Because of this procedural default, Ford may not raise this issue before a federal court absent cause for the failure to object and actual prejudice resulting from the alleged error. See *Engle v. Isaac*, — U.S. —, —, 102 S.Ct. 1558, 1567, 71 L.Ed.2d 783, 801 (1982); *Wainwright v. Sykes*, 433 U.S. 72, 90-91, 97 S.Ct. 2497, 2508, 53 L.Ed.2d 594 (1977). In my view, both cause and prejudice are amply demonstrated.

In *Engle v. Isaac*, the Supreme Court announced a formulation of cause that holds trial counsel to a strict duty to recognize and raise potential trial errors of constitutional magnitude. The futility of raising an argument, alone, can no longer justify counsel's failure to raise it; there can be no cause when the bases for the constitutional claim are available and other attorneys have perceived and litigated that claim. *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1574, 71 L.Ed.2d at 804; see *Dietz v. Solem*, 677 F.2d 672, 675 (8th Cir.1982). In *Engle* itself, for example, the Court could point to recent Supreme Court precedent clearly establishing the basis for the claim asserted by *Engle*, as well as dozens of cases in which the

importance attached to the ultimate decision.” 441 U.S. at 423, 99 S.Ct. at 1808. The Court alluded to this symbolic value in reference to cases involving individual rights where the standard of proof reflects the value society places on individual liberty. *Id.* at 425, 99 S.Ct. at 1808. Accord *Santosky v. Kramer*, — U.S. at —, 102 S.Ct. at 1397. Surely no other finding in the history of litigation is comparable in importance to the life or death issue in death cases. Accordingly, I submit that the reasonable doubt standard must apply.

For the foregoing reasons, I conclude that due process requires that the death penalty be imposed only when the fact finder is convinced beyond a reasonable doubt of the propriety of that penalty.⁹

claim had been raised and litigated in federal and state courts. See also *Dietz v. Solem*, 677 F.2d at 675 (although at time of trial counsel could not anticipate subsequent Supreme Court decision striking down similar jury instruction, subsequent decision relied on precedent existing at time of defendant's trial, and cited earlier cases in federal and state courts striking down similar instructions). Unlike the situation in *Engle*, I have found no federal cases in which this issue has been litigated. In those state cases in which the trial court or the jury used the reasonable doubt standard, note 7 *supra*, there is no suggestion that this issue was litigated; instead the appellate courts merely acknowledged use of that standard. Only one state court has explored the question whether the reasonable doubt standard applies to the weighing process. *State v. Wood*, 648 P.2d 71, 83-84 (Utah 1982) (explaining conclusions reached by same court in *State v. Wood*, 648 P.2d 71 (1981) (per curiam)). Its decision was handed down after Ford's direct appeal. Indeed the position of the majority opinion in this case—that the weighing process is not susceptible to a standard of proof—reflects the understandable mindset of lawyers steeped in the experience of traditional sentencing. The novelty of the question, in my view, therefore constitutes sufficient cause for Ford's failure to raise the issue at trial. To hold otherwise would be “to adopt a rule that would require trial counsel either to exercise extraordinary vision or to object to every aspect of the proceedings in the hope that some aspect might mask a latent constitutional claim.” *Engle v. Isaac*, — U.S. at —, 102 S.Ct. at 1572, 71 L.Ed.2d at 802. If the “tools” necessary to construct the constitutional claim are lacking, a defendant's procedural default should be excused.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

U.S. COURT OF APPEALS
ELEVENTH CIRCUIT

FILED

MAR 17 1983

Norman E. Zeller
Clerk

No. 81-6200

ALVIN BERNARD FORD,

Petitioner,

versus

CHARLES G. STRICKLAND, JR., Warden
Florida State Prison; LOUIE L. WAINWRIGHT,
Secretary, Department of Offender
Rehabilitation, State of Florida,
JIM SMITH, Attorney General, State of Florida,

Respondents.

Appeal from the United States District Court for the
Southern District of Florida

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
(Opinion JANUARY 7, 11 Cir., 1983, F.2d).

(March 17, 1983)

Before *ALL ACTIVE ELEVENTH CIRCUIT JUDGES

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is DENIED.

~~() The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 26), the Suggestion for Rehearing En Banc is also DENIED.~~

~~() A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.~~

ENTERED FOR THE COURT:

Paul H. Roney
United States Circuit Judge

*Judge Joseph W. Hatchett is recused.

REHG-6
(Rev. 6/82)

CHAPTER 921

SENTENCE

PENALTY.—Upon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment as authorized by s. 775.082. The proceeding shall be conducted by the trial judge before the trial jury as soon as practicable. If, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a special juror or jurors as provided in chapter 913 to determine the issue of the imposition of the penalty. If the trial jury has been waived, or if the defendant pleaded guilty, the sentencing proceeding shall be conducted before a jury impaneled for that purpose, unless waived by the defendant. In the proceeding, evidence may be presented as to any matter that the court deems relevant to the nature of the crime and the character of the defendant and shall include matters relating to any of the aggravating or mitigating circumstances enumerated in subsections (5) and (6). Any such evidence which the court deems to have probative value may be received, regardless of its admissibility under the exclusionary rules of evidence, provided the defendant is accorded a fair opportunity to rebut any hearsay statements. However, this subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the Constitution of the State of Florida. The state and the defendant or his counsel shall be permitted to present argument for or against sentence of death.

(2) **ADVISORY SENTENCE BY THE JURY.**—After hearing all the evidence, the jury shall deliberate and render an advisory sentence to the court, based upon the following matters:

- (a) Whether sufficient aggravating circumstances exist as enumerated in subsection (5);
- (b) Whether sufficient mitigating circumstances exist which outweigh the aggravating circumstances found to exist; and
- (c) Based on these considerations, whether the defendant should be sentenced to life imprisonment or death.

(3) **FINDINGS IN SUPPORT OF SENTENCE OF DEATH.**—Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set forth in writing its findings upon which the sentence of death is based as to the facts:

- (a) That sufficient aggravating circumstances exist as enumerated in subsection (5), and
- (b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon

921.141 Sentence of death or life imprisonment for capital felonies; further proceedings to determine sentence.—

- (1) **SEPARATE PROCEEDINGS ON ISSUE OF**

the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

(4) **REVIEW OF JUDGMENT AND SENTENCE.**—The judgment of conviction and sentence of death shall be subject to automatic review by the Supreme Court of Florida within 60 days after certification by the sentencing court of the entire record, unless the time is extended for an additional period not to exceed 30 days by the Supreme Court for good cause shown. Such review by the Supreme Court shall have priority over all other cases and shall be heard in accordance with rules promulgated by the Supreme Court.

(5) **AGGRAVATING CIRCUMSTANCES.**

—Aggravating circumstances shall be limited to the following:

- (a) The capital felony was committed by a person under sentence of imprisonment.
- (b) The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person.
- (c) The defendant knowingly created a great risk of death to many persons.
- (d) The capital felony was committed while the defendant was engaged, or was an accomplice, in the commission of, or an attempt to commit, or flight after committing or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing, or discharging of a destructive device or bomb.
- (e) The capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
- (f) The capital felony was committed for pecuniary gain.
- (g) The capital felony was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.
- (h) The capital felony was especially heinous, atrocious, or cruel.
- (i) The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(6) **MITIGATING CIRCUMSTANCES.**

—Mitigating circumstances shall be the following:

- (a) The defendant has no significant history of prior criminal activity.
- (b) The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.
- (c) The victim was a participant in the defendant's conduct or consented to the act.
- (d) The defendant was an accomplice in the capital felony committed by another person and his participation was relatively minor.
- (e) The defendant acted under extreme duress or under the substantial domination of another person.
- (f) The capacity of the defendant to appreciate

the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

(g) The age of the defendant at the time of the crime.

History.—s. 237a, ch. 19054, 1909; CGL 1940 Supp. 6867(240), s. 119, ch. 70, 139; s. 1, ch. 72-72, s. 9, ch. 72-724, s. 1, ch. 74-379, s. 248, ch. 77-104, s. 1, ch. 77-174, s. 1, ch. 79-351.

Note.—Former s. 919.23.

Alvin Bernard FORD, Appellant,

v.

STATE of Florida, Appellee.

No. 47059.

Supreme Court of Florida.

July 18, 1979.

Rehearing Denied Sept. 24, 1979.

Defendant was convicted in the Circuit Court, Broward County, J. Cail Lee, J., of first-degree murder, and he appealed. The Supreme Court held that: (1) that penalty statute was not per se violative of defendant's right to enjoy life; (2) refusal to allow defense counsel to recall eyewitness for further cross-examination in nature of impeachment was not error under circumstances; (3) denial of motion to sequester jury by reason of purported misconduct consisting of comments allegedly made by one juror at a racetrack and by reason of media coverage was not error under facts presented, and (3) given presence of aggravated circumstances and lack of any mitigating factors, imposition of death penalty was not improper and did not deny defendant due process.

Affirmed

1. Constitutional Law — 82(6)

Homicide — 351

Statute authorizing sentence of death on conviction of first-degree murder is not per se violative of defendant's right to enjoy life. West's F.S.A. § 921.141; West's F.S.A.Const. art. 1, § 2.

2. Witnesses — 332

Refusal to allow defense counsel to recall eyewitness to crime for further cross-examination in nature of impeachment via an alleged prior inconsistent statement was not error where defense counsel failed to lay a proper predicate for eyewitness' impeachment by presenting her with circumstances of her alleged prior inconsistent statement and where defendant was not

prejudiced in any event because eyewitness herself admitted on cross-examination that she had in fact given different accounts of criminal episode at different times. F.S. 1975, § 90.10.

3. Criminal Law — 854(2)

There is no authority for position that denial of a motion to sequester in a capital case is an automatic abuse of discretion. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.370(a).

4. Criminal Law — 854(1)

Denial of defendant's motion to sequester jury by reason of extensive media coverage was not error in absence of evidence of unfair or unduly pervasive media coverage of trial or events which preceded it. 34 West's F.S.A. Rules of Criminal Procedure, rule 3.370(a).

5. Criminal Law — 854(1)

Trial court did not err in refusing to sequester jury by reason of alleged misconduct of a juror by reason of comments made by him at a racetrack where, aside from fact that juror denied categorically that he told his companions at racetrack anything beyond fact that he was sitting on case, transgression allegedly committed by juror was not such as to require sequestration.

6. Homicide — 354

That homicide was committed while defendant was engaged in attempted commission of crime of robbery and that capital felony was committed for pecuniary gain should not have been treated as independent aggravating factors, but since five other aggravating circumstances could properly be said to exist in case, and since there were no mitigating factors present, death was presumed to be appropriate penalty on conviction of first-degree murder. West's F.S.A. §§ 921.141, 921.141(5)(a, b, d).

7. Homicide — 354

Conclusion was inescapable, given presence of five aggravated circumstances in absence of mitigating factors, that proper sentence on conviction of murder in the first degree was a sentence of death. West's F.S.A. §§ 921.141, 921.141(5)(a, b, d).

8. Constitutional Law — 270(2)

Defendant was not denied due process in imposition of death sentence on conviction of first-degree murder due to consideration by trial judge of information which defendant had no opportunity to deny or explain. West's F.S.A. §§ 921.141, 921.141(5)(a, b, d); U.S.C.A.Const. Amend. 14.

Robert T. Adams, Jr., Marianna, for appellant.

Jim Smith, Atty. Gen., and Patti Englander, Asst. Atty. Gen., Tallahassee, for appellee.

PER CURIAM

This cause is here on direct appeal from a conviction of first degree murder and sentence of death. We have jurisdiction under article V, section 3(b)(1), Florida Constitution.

On the morning of July 21, 1974, Ford and three others, who had decided to commit a robbery, went with weapons to a Red Lobster Restaurant in Fort Lauderdale, Florida. During the robbery, after two people had escaped from the restaurant, Ford's three accomplices realized the police would soon arrive and so left the scene of the crime. Ford remained in order to effectuate the theft of some \$7,000 from the restaurant's vault and was confronted by Officer Dimitri Walter Ilyankoff of the Fort Lauderdale Police Department. Ford shot the policeman three times, wounding him fatally. Appellant escaped in the decedent's police car, and his fingerprints were later found in the vehicle after it had been abandoned. He was arrested in the vicinity of Gainesville, Florida, and was returned to Fort Lauderdale for indictment and trial.

At trial, defense counsel moved to sequester the jury in view of allegedly heavy media coverage of all the events surrounding the death of the local officer. The judge denied the motion to sequester. Later in the trial, unauthorized reading material—four magazines of the *Time-Life* variety—was discovered in the jury room. A motion for mistrial was denied, it appearing

to the judge that no prejudice had been demonstrated. Among the thirty witnesses presented by the State at trial was Mrs. Barbara Buchanan, an employee of the Red Lobster, who saw and heard the firing of the final shot. Some twenty witnesses later, appellant's counsel attempted to recall Mrs. Buchanan for further cross-examination after learning that she had made inconsistent statements which were not produced during discovery proceedings. This request was denied, as was the opportunity of calling another witness for the defense for the purpose of impeaching Mrs. Buchanan through evidence of her allegedly inconsistent prior statements.

Near the end of this two-week trial, defense counsel's secretary answered a call from an anonymous informant, who claimed that he had seen a juror, one Huber, in a box at a local racetrack on the preceding Friday. This informant said that he had heard Huber telling a companion that he was a juror at the trial of "the guy who killed the cop" and that the State had an "open and shut case." With the jury excluded, the secretary testified to this effect in court. Huber was brought before the judge, confirmed that he had been to the racetrack the preceding Friday, had sat where and with whom the tipster had indicated, and that he had told his companions that he was a juror on the Ford case. However, Huber denied that he had made any statement suggesting that he had made up his mind about the defendant's guilt or innocence. The judge denied a defense motion for mistrial on the basis of juror misconduct.

The jury found appellant guilty of first degree murder, and after the second phase of the trial held pursuant to section 921.141, Florida Statutes (1975), recommended the death penalty. The trial court entered judgment on the verdict and sentenced Ford to death.

On this appeal Ford raises three points. The first is that the death penalty statute is unconstitutional on both state and federal constitutional grounds. Second, he contends that the court's refusal to allow de-

fense counsel to recall Mrs. Buchanan for further cross-examination in the nature of impeachment was erroneous. Third, he argued that, in light of subsequent juror misconduct, it was reversible error for the trial court to deny a motion to sequester the jury.

[1] Section 921.141, Florida Statutes (1975), has been authoritatively upheld as constitutional on both state and federal grounds. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *State v. Dixon*, 283 So.2d 1 (Fla.1973). To the extent that *Dixon* did not lay to rest appellant's argument that the death penalty is per se violative of the "right to enjoy life" under article 1, section 2, Florida Constitution, we do so now.

As indicated above, at trial the State produced an eyewitness who saw and heard the last shot and identified Ford as the killer. After being examined by counsel for both sides, Mrs. Buchanan was excused. Later, appellant's attorney learned from another lawyer not involved in this case that the witness had made allegedly inconsistent statements with regard to this identification at a bond hearing held three months earlier for DeCosta, one of the other men charged with the instant criminal action. Apparently, the testimony at the DeCosta bond hearing was never transcribed, although the prosecuting attorney in Ford's case was aware of its existence and had in fact participated in the hearing. Appellant's attorney asked that Mrs. Buchanan be called for further cross-examination. The trial judge denied the request. Defense counsel later asked that a Fort Lauderdale police officer, one Bucata, be called as a witness for the defendant to testify to the fact that Mrs. Buchanan had told him that she could not see the killer above the waist. The defense evidently thought that such testimony would provide the predicate for impeachment by further cross-examination of Mrs. Buchanan concerning her ability to identify the defendant, an issue of critical importance in the trial. In his brief appellant submits that "[t]his factual situation clearly shows an abuse of discretion by the trial court in a capital case."

[2] We do not find that the court erred in declining to accede to the defense request to recall Mrs. Buchanan for further cross-examination. Section 90.10, Florida Statutes (1975), clearly sets forth the prerequisites to impeachment of an adverse witness.

Impeachment of witness by adverse party—If a witness, upon cross examination as to a former statement made by him relative to the subject matter of the cause and inconsistent with his present testimony, does not distinctly admit that he has made such statement, proof may be given that he did in fact make it, but before such proof can be given, the circumstances of the supposed statement, sufficient to designate the particular occasion, must be mentioned to witness, and he must be asked whether or not he made such statements.

Under the statute it is clear that a proper predicate for Mrs. Buchanan's impeachment could have been laid only by presenting her with the circumstances of her alleged prior inconsistent statement. This defense counsel failed to do. It was not the State's responsibility to transcribe the text of the DeCosta hearing, and nothing prevented defense counsel from requesting that such a transcription of Mrs. Buchanan's allegedly inconsistent testimony be made for purposes of impeachment at trial. Defense counsel never moved for a continuance to allow a court reporter to transcribe notes taken at the prior hearing. (We might point out that appellant has not furnished us a transcript of such testimony even now to aid us in determining the merit of this point on appeal.) Much the same can be said of the attempt to call Officer Bucata about the allegedly conflicting statements concerning identification which Mrs. Buchanan had supposedly made to him. Defense counsel had had an opportunity to explore this matter in cross-examination; trial judges have considerable latitude in deciding whether to alter orderly courtroom procedure, even in order to compensate for an attorney's oversight. See generally *Ross v. Yuille*, 88 So.2d 318 (Fla.1956); *Arbogast*

v. State, 266 So.2d 161 (Fla.3d DCA 1972); *Bowen v. Manuel*, 144 So.2d 341 (Fla.2d DCA 1962). Finally, the appellant was not prejudiced by the trial court's rulings because the witness herself admitted on cross-examination that she had in fact given differing accounts of this criminal episode at different times:

"Q [Defense Counsel] Well, just let me ask you this: We are all human. With regard to these three or four times you talked to the officers and at least a couple of times with Mr. Satz, did your stories differ, at least to some extent, considering all of those statements?

"A Yes.

"Q They did; correct?

"A Yes."

Appellant's third argument is that, in view of subsequent juror misconduct, it was reversible error for the trial court to have denied his motion to sequester the jury. The purported misconduct consisted of the comments allegedly made by Huber at the racetrack and of the presence in the jury room during trial (but before deliberations) of news magazines which included articles on "Godfather II" and "The Law: Living on Death Row." Appellant further urges that it is an automatic abuse of discretion to deny a motion to sequester the jury in a capital case.

[3,4] The State argues correctly that there is no authority for appellant's position that denial of a motion to sequester in a capital case is an automatic abuse of discretion. Rule 3.370(a), Florida Rules of Criminal Procedure, leaves the decision to the trial judge's discretion, and there is nothing about a capital case which makes a refusal to sequester a per se abuse of that discretion. Furthermore, the appellant has made no showing that there was such an abuse in the instant case. At trial, appellant's motion to sequester was supported only by the recollections of his counsel:

I would at this time move the Court to sequester the jury. As I indicated, it would be a distinct possibility. I don't think anybody is going to purposely violate the rule of the Court, particularly the

jurors, but, Judge, knowing the news media, who are still present in the courtroom, I don't see how anybody can live in society with electronics, TV, radio driving to the courthouse in the morning, and not get some squib in the nature of the ones that were on in the morning, that is, to the effect that this was an execution.

All you have to do is hear something about "This was an execution," in my opinion, and we are going to have to start over. I do not think it is an unreasonable request at this time for this case and I am referring specifically to the WFTL news broadcast, about 8:00 o'clock this morning, followed by some comments of a fellow, identified on the radio as Joe Barberett, who was sort of editorializing, which I happen to have heard riding to work this morning.

Nothing in the record before us suggests the existence of unfair or unduly pervasive media coverage of this trial or the events which preceded it. Absent such a showing, the trial judge's denial of Ford's motion to sequester was correct.

[5] Of appellant's two *post hoc* grounds for challenging the denial of the motion to sequester, the only one which merits discussion is his attempt to utilize the alleged misconduct of juror Huber as a "bootstrap" to a conclusion that the court erred in refusing to sequester the jury from the outset. First, the court promptly questioned Huber about the incident, and the juror denied categorically that he told his companions at the racetrack anything beyond the fact that he was sitting on the Ford case. Thus *Durano v. State*, 262 So.2d 733 (Fla.3d DCA 1972), relied upon by appellant, is inapplicable because there the juror admitted discussing the merits of the case with an outsider. Second, even if one believes the anonymous tipster's story, as related by defense counsel's secretary, rather than Huber's account of the incident, it becomes clear that the transgression allegedly committed by the juror is not the evil at which sequestration is directed. Sequestration is designed to keep the jurors insulated from improper influences during

the course of the trial, the phone call suggests that Huber had made up his mind before trial and was attempting to express his views to others, not vice versa. Finally, defense counsel expressly decided not to move that Huber be dismissed from the panel and replaced by an alternate, despite the trial judge's evident willingness to entertain such a motion.

We note further that the trial judge and defense counsel agreed after the verdict that the latter would ask juror Huber to identify the young couple to whom he spoke at the racetrack about his status as a juror

in the Ford case. Appellant's counsel could then interview these people and include in his motion for new trial any helpful information such an investigation developed; since there is no reference in the record to the result of such an inquiry, we must conclude that it did not yield anything further.

[6] We come now to the matter of appellant's sentence of death. The trial judge carefully set forth his analysis of the applicability of the statutory aggravating and mitigating circumstances under section 921.141, Florida Statutes (1975), to the facts of this case.¹ He found that none of the

1. SENTENCE

The defendant was indicted for the crime of Murder in the first degree of Dimitri Walter Ilyankoff, age 40.

The Jury found the defendant guilty of Murder in the first degree of the said Dimitri Walter Ilyankoff, pursuant to which finding the Court adjudged the defendant to be guilty of Murder in the first degree.

The Court having heard all the evidence in this case, and having had the benefit of a pre-sentence investigation and report conducted by the Broward County office of the Florida Parole and Probation Commission at the request of the defendant, and having had the further benefit of an advisory sentence found and returned by the Trial Jury herein recommending that sentence of death be imposed against the defendant, the Court hereby makes its findings as to each of the elements of aggravation and/or mitigation which are set forth in Florida Statutes and which were guide-lines for the Jury in considering its Advisory Sentence.

The Court has summarized the facts as brought out in the Trial and in the pre-sentence investigation report and applied them to each element of aggravation and/or mitigation where such elements are applicable.

In summarizing these elements of aggravation and/or mitigation, the Court has listed them in reverse order as follows:

MITIGATING CIRCUMSTANCES

A. WHETHER DEFENDANT HAS NO SIGNIFICANT HISTORY OF PRIOR CRIMINAL ACTIVITY

FACT

On or about March 18, 1972, the defendant was found guilty of the felony offense of breaking and entering with intent to commit a felony. He was placed on probation, which probation he has now obviously violated.

FACT

The pre-sentence investigation report reflects that defendant was repeatedly involved in criminal narcotics violations, including, among other things, numerous large sales of cocaine for profit.

CONCLUSION

There is no mitigating circumstance under this paragraph because there was a significant history of other criminal activity by the Defendant.

B. WHETHER THE MURDER WAS COMMITTED WHILE DEFENDANT WAS UNDER THE INFLUENCE OF EXTREME MENTAL OR EMOTIONAL DISTURBANCE

FACT

Although the Defendant did not testify the testimony of the other witnesses involved in the incident reflected the Defendant was in control of his own activities and, in fact, in control of the situation. He voluntarily chose to remain at the scene after the three others involved had fled, thereby creating the confrontation out of which the instant case arose.

FACT

The Defendant was examined by a psychiatrist, Dr. David Taubel, of Broward County, Florida, who testified that the Defendant understood the nature and quality of his acts, but that he had a basic hostility towards society, although Dr. Taubel further testified that the Defendant could be salvaged, he admitted that it would be a long and involved process.

CONCLUSION

There is no mitigating circumstance under this paragraph.

C. WHETHER THE VICTIM WAS A PARTICIPANT IN THE DEFENDANT'S CONDUCT OR CONSENTED TO THE ACT

FACT

The defendant, having already grievously wounded the decedent, Dimitri Walter Ilyankoff, again shot Dimitri Walter Ilyankoff in the head after he was helpless, no longer constituted a threat to the defendant nor to his escape and, in fact, after the decedent repeatedly asked for aid.

CONCLUSION

There is obviously no mitigating circumstance under this paragraph.

mitigating circumstances but *all* of the aggravating circumstances were present.

While we agree that none of the mitigating circumstances are applicable, it is our con-

D. WHETHER THE DEFENDANT WAS AN ACCOMPLICE IN THE MURDER COMMITTED BY ANOTHER PERSON, AND THE DEFENDANT'S PARTICIPATION WAS RELATIVELY MINOR.

FACT:

The trial evidence showed that as set forth in paragraph B above, the defendant voluntarily remained at the scene after the other participants in the crime had fled. The defendant was obviously a principal and, in fact, major principal in the murder of Dimitri Walter Ilyankoff.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

E. WHETHER THE DEFENDANT ACTED UNDER EXTREME DURESS OR UNDER THE SUBSTANTIAL DOMINATION OF ANOTHER PERSON.

FACT:

No element of duress was ascertained by the psychiatrist as set forth in paragraph B above. There is absolutely no testimony of duress in any degree which would justify the crime of which he was convicted.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

F. WHETHER THE CAPACITY OF THE DEFENDANT TO APPRECIATE THE CRIMINALITY OF HIS CONDUCT OR TO CONFORM HIS CONDUCT TO THE REQUIREMENTS OF LAW WAS SUBSTANTIALLY IMPAIRED.

FACT:

As stated in paragraph B above, Dr. Taubel determined that the defendant was intelligent and able to understand the nature and quality of his acts. The evidence showed that the defendant had in the past held jobs and positions of considerable responsibility and that he had had at least some exposure to a college education.

CONCLUSION:

There is no mitigating circumstance under this paragraph.

G. THE AGE OF THE DEFENDANT AT THE TIME OF THE CRIME.

FACT:

The defendant is a twenty-one year old black male, apparently physically mature and with at least an average intelligence without any impairment of the reasoning process.

CONCLUSION:

Although defendant's comparative youth might be considered a mitigating circumstance, it is not of sufficient mitigation to overcome the other circumstances of this case.

CONCLUSION OF COURT

There are no mitigating circumstances existing—either statutory or otherwise—which

outweighs any aggravating circumstances, to justify a sentence of life imprisonment rather than a sentence of death.

The Court now summarizes the facts brought out in trial and the pre-sentence investigation and applies them to the elements of aggravation which were considered by the Jury in arriving at their Advisory Sentence.

AGGRAVATING CIRCUMSTANCES

A. WHETHER THE DEFENDANT WAS UNDER SENTENCE OF IMPRISONMENT WHEN HE COMMITTED THE MURDER OF WHICH HE WAS CONVICTED.

FACT:

Although the defendant was not imprisoned at the time of the murder, he did actually prevent arrest, prosecution and imprisonment for his other crime at least temporarily, by the very murder for which he has been convicted.

CONCLUSION:

This is an aggravating circumstance which justifies a sentence of death.

B. WHETHER THE DEFENDANT HAS PREVIOUSLY BEEN CONVICTED OF ANOTHER CAPITAL FELONY OR OF A FELONY INVOLVING THE USE OF THREAT OF VIOLENCE TO THE PERSON.

FACT:

The defendant has been found guilty of breaking and entering to commit a felony, which would obviously involve the threat of violence to the person of anyone whom he might have confronted on the premises. Further, he has admitted the unlawful sale of narcotics drugs, which likewise involves a threat to the safety of members of the public.

CONCLUSION:

There is an aggravating circumstance under this paragraph which justifies the imposition of the sentence of death.

C. WHETHER, IN COMMITTING THE MURDER OF WHICH HE HAS JUST BEEN CONVICTED, THE DEFENDANT KNOWINGLY CREATED A GREAT RISK OF DEATH TO MANY PERSONS.

FACT:

The trial evidence shows that the defendant not only threatened a number of other persons beside the decedent with a deadly weapon, he further operated a stolen motor vehicle at high rates of speed and at an obvious risk to the lives and safety of many others on the highways.

CONCLUSION:

There is an aggravating circumstance under this paragraph.

D. WHETHER THE MURDER OF WHICH DEFENDANT WAS CONVICTED WAS COMMITTED WHILE HE WAS ENGAGED IN THE COMMISSION OF, OR AN ATTEMPT TO COMMIT, OR FLIGHT

clusion that the court erred in finding the existence of two of the aggravating circumstances, those listed in sections 921.141(5)(a) (defendant under sentence of imprisonment when capital felony committed) and (5)(b) (defendant previously convicted of another capital felony or of a felony involving the use or threat of violence to the person), Florida Statutes (1975). We note also that

AFTER COMMITTING OR ATTEMPTING TO COMMIT, ANY ROBBERY, RAPE, ARSON, BURGLARY, KIDNAPPING, AIRCRAFT PIRACY, OR THE UNLAWFUL THROWING, PLACING OR DISCHARGING OF A DESTRUCTIVE DEVICE OR BOMB

FACT

The murder committed by defendant was committed during his attempted commission of the crime of robbery.

CONCLUSION

There is an aggravating circumstance under this paragraph in that defendant was attempting to commit the crime of robbery at the time of the commission of the within murder.

- E. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR THE PURPOSE OF AVOIDING OR PREVENTING A LAWFUL ARREST OR EFFECTING AN ESCAPE FROM CUSTODY.**

FACT

As previously stated the evidence and testimony showed that the defendant committed the murder for which he stands convicted for the purpose of preventing his lawful arrest at the time of the robbery.

CONCLUSION

There is an aggravating circumstance here in that he did murder Dimitri Walter Ilyankoff to avoid and prevent his arrest.

- F. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED FOR PECUNIARY GAIN.**

FACT

The evidence and testimony showed that the defendant during the commission or the attempt to commit a robbery forced the restaurant manager to open the safe and, in fact, refused to leave with the other miscreants presumably because he had not had time to empty the safe of its contents.

CONCLUSION

There is an aggravating circumstance in this paragraph in that the defendant remained after the others involved in the crime of robbery had already left in order to avail himself of the remaining contents of the safe.

- G. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS COMMITTED TO DISRUPT OR**

the trial judge found as separate aggravating factors that the homicide was committed while appellant was engaged in the attempted commission of the crime of robbery [section 921.141(5)(d), Florida Statutes (1975)], and that the capital felony was committed for pecuniary gain [section 921.141(5)(f), Florida Statutes (1975)]. Under the circumstances of this case the considera-

HINDER THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTION OR THE ENFORCEMENT OF LAWS.

FACT

The defendant shot the decedent, Dimitri Walter Ilyankoff, without warning while the decedent was investigating a robbery or attempted robbery.

CONCLUSION

There is an aggravating circumstance under this paragraph.

- H. WHETHER THE MURDER OF WHICH THE DEFENDANT HAS BEEN CONVICTED WAS ESPECIALLY HEINOUS, ATROCIOUS OR CRUEL.**

FACT

As previously stated the defendant shot the decedent without warning twice in the body, grievously wounding him. Then, despite the decedent's pleas for help and after he no longer constituted a threat to the defendant's safety or his escape and while the decedent was in fact completely helpless, the defendant again shot the decedent, this time in the head causing his immediate death.

CONCLUSION

There is an aggravating circumstance under this paragraph.

CONCLUSION OF COURT

There are sufficient and great aggravating circumstances which exist to justify the sentence of death. Indeed, it is difficult to imagine a crime which is more heinous, atrocious and cruel and under our existing law it is deserving of no sentence but death. Accordingly and having adjudged you to be guilty of murder in the first degree, I hereby sentence you to be remanded instantler and without bail to the custody of the Sheriff of Broward County, Florida, for further remanding by him to the custody of the authorities of the Division of Corrections of the State of Florida, by them to be kept in close confinement in the Florida State Penitentiary System until a date is set for your execution and that on such date you be put to death in the manner prescribed by law, that is, by electrocution. You have thirty days from this date within which to appeal the Judgment and Sentence and I hereby appoint the Special Assistant Public Defender, Robert T. Adams, to represent you on your appeal. May God have mercy on your soul.

tion of the appellant's conduct as two independent aggravating factors is faulted by our ruling in *Provence v. State*, 337 So.2d 783 (Fla.1976). Nevertheless, our review of the evidence convinces us that the other five aggravating circumstances may properly be said to exist in this case. The testimony of Mrs. Buchanan was that Officer Ilyankoff, after being wounded twice, was shot a third time when he posed no danger to Ford's escape and was in fact trying to cooperate with the armed appellant. We therefore make the specific finding that the killing was "especially heinous, atrocious, or cruel" under section 921.141(5)(h), Florida Statutes (1975). Consequently, even though there was error in assessment of some of the statutory aggravating factors, there being no mitigating factors present ~~death~~ is presumed to be the appropriate penalty. *Elledge v. State*, 346 So.2d 998 (Fla.1977); *State v. Dixon*, *supra*.

[7] We have not overlooked the testimony favorable to appellant's character and prior behavior presented by the defense in mitigation during the sentencing trial. We do not pretend to know what motivated Alvin Bernard Ford to take the life of Dimitri Walter Ilyankoff. Our duty under section 921.141, Florida Statutes (1975), as upheld by the United States Supreme Court in *Proffitt v. State*, *supra*, is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry to the facts of the capital cases which come before us. In this case the process compels the inescapable conclusion that the proper sentence is the death penalty.

In view of the opinion of the Supreme Court of the United States in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), this Court by order entered June 21, 1977, directed to the trial judge, inquired of the trial judge whether in weighing the aggravating and mitigating circumstances of the case he considered information which the appellant had no opportunity to deny or explain. By such order, the trial judge who imposed the death sentence was directed to file a response

with this Court within twenty days stating whether he imposed the death sentence in consideration of any information not known to appellant. The trial court was further directed to furnish this Court with any pre-sentence investigation, juvenile case file information, psychiatric reports, or otherwise, which were before it for consideration in imposing sentence. Pursuant to such order, a copy of which was served upon counsel for appellant and appellee, the trial judge filed his response in this Court on July 8, 1977, certifying that copies thereof were furnished to the Honorable Michael J. Satz, State Attorney, Seventeenth Judicial Circuit; Honorable Robert E. Lockwood, Clerk of Circuit Court; Honorable Robert T. Adams, Jr., counsel for appellant; and Honorable Patti Englander, Assistant Attorney General, counsel for appellee. By his response the trial judge advises this Court that he did not impose the death sentence in consideration of any information not known to appellant. He responds that according to the court's case file records and the judge's best recollection no written psychiatric reports or juvenile case file reports were furnished to the court. He affirmatively states that a pre-sentence investigation report, copy of which was attached to his response, was prepared at the request of, and a copy furnished to, the trial attorney for appellant, Honorable Robert T. Adams, Jr., in its entirety, based on the belief of the trial judge.

[8] No response having been filed in this Court by counsel for the appellant or appellee contradicting or amplifying the response of the trial judge, and after a review of the pre-sentence investigation report, we expressly find that appellant was not denied due process in the imposition of the death sentence due to consideration by the trial judge of information which the appellant had no opportunity to deny or explain.

Accordingly, the judgment and sentence are affirmed.

ENGLAND, C. J., and ADKINS, BOYD, OVERTON, SUNDBERG and HATCHETT, JJ., concur.

Joseph Green BROWN et al., Petitioners,

v.

Louie L. WAINWRIGHT, Respondent.

No. 59732.

Supreme Court of Florida.

Jan. 15, 1981.

Defendant joined with other convicted murderers in petitioning for writ of habeas corpus to obtain relief from allegedly unconstitutional sentences of death. The Supreme Court held that: (1) joinder of habeas corpus petitions of convicted murderers previously sentenced to death was allowed to avoid absurd technicalities, even though petitioners' cases were in different stages of appellate process, and (2) consideration by Supreme Court of information concerning capital appellants, which was not presented at trial and not part of trial record or record on appeal, was not unconstitutional since Supreme Court's rule was

merely to review and not to impose death sentence.

Petitions denied.

Boyd, J., concurred in result with opinion.

1. Habeas Corpus — 52

A joinder of habeas corpus petitions, being unique, requires close scrutiny and a compelling justification.

2. Habeas Corpus — 52

Joinder of habeas corpus petitions of 123 convicted murderers who had been sentenced to death would be allowed to avoid absurd technicalities, even though some of petitioners' cases were still in different stages of appellate process.

3. Criminal Law — 1134(1)

Supreme Court's role after death sentence has been imposed is to review lower court's decision and consists of two discrete functions: to determine if jury and judge acted with procedural rectitude in applying death sentence statute; and to ensure relative proportionality among death sentences which have been approved statewide. West's F.S.A. § 921.141.

4. Criminal Law — 1158(1)

If the findings of aggravating and mitigating circumstances by trial court are supported by sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances, if the jury's recommendation was not unreasonably rejected, and if the death sentence is not disproportionate to others properly sustainable under the death penalty statute, the trial court's sentence must be sustained even though, had Supreme Court been triers and weighers of fact, it might have reached a different result in an independent evaluation. West's F.S.A. § 921.141.

5. Criminal Law — 1134(2)

Consideration by Supreme Court of information concerning convicted murderers, which was not presented at trial and was not part of trial record or record on appeal,

including presentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel, during appeals from convictions imposing death sentence was not unconstitutional since Supreme Court's role was merely to review and not to impose death sentence. U.S.C.A. Const. Amendments. 5, 14; West's F.S.A. § 921.141.

Samuel S. Jacobson and Albert J. Datz of Datz, Jacobson & Læmbecke, Jacksonville, Marvin E. Frankel, New York City, Richard L. Jorandby, Public Defender and Craig S. Barnard, Chief Asst. Public Defender, West Palm Beach, for petitioners.

Jim Smith, Atty. Gen., and George R. Georgieff, Carolyn M. Snurkowski and Raymond L. Marky, Asst. Attys. Gen., Tallahassee, for respondent.

PER CURIAM.

Joseph Green Brown petitions the Court for a writ of habeas corpus to obtain relief from an allegedly unconstitutional sentence of death. Brown was convicted of first-degree murder and sentenced to death, following which his conviction and sentence were affirmed by this Court. *Brown v. State*, 381 So.2d 690 (Fla. 1980). An application for certiorari is now pending in the United States Supreme Court. *Brown v. Florida*, No. 80 5708 (U.S. Nov. 17, 1980).

Alleging common issues of law and fact, Brown has joined with one hundred and twenty-two other persons who seek relief from allegedly unconstitutional sentences of death. The dominant theme in the multiple requests for relief is the alleged impropriety of this Court's having considered, in the course of reviewing sentences of death, documents which were not made available to the defendants' counsel. For most of the petitioners, the alleged impropriety was the Court's consideration of undisclosed documents not related to the proceedings in which their sentences were imposed or upheld, but seen in the course of reviewing

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death sentences approved or considered for other criminal defendants.

Before reaching the merits of the petitions, we first consider the procedural basis on which the Court has been asked to entertain habeas corpus petitions on a consolidated basis.

I

[1] The writ of habeas corpus—the common law remedy used primarily to deliver from imprisonment those who are illegally confined¹—has long been recognized as an essential vehicle by which fundamental individual liberties are shielded from illegal governmental action.² Traditionally, habeas corpus has been characterized by its utility in cutting through the “procedural morass” of institutional red tape so as to secure the release of persons unlawfully detained.³ It has been recognized, however, that no prisoner has an interest in the illegal restraint of another, since a sentence of imprisonment operates on each individually.⁴ A joinder of habeas corpus petitions, therefore, being unique, requires close scrutiny and a compelling justification.

The joinder of criminal defendants in trial proceedings is commonplace. The reasons which support joinder in those situations—considerations of judicial economy flowing from the presentation of common issues of law and fact, weighed against the potential prejudice to the defendants sought to be joined⁵—provide a useful perspective from which to examine the desirability of deciding jointly the claims presented here.

In multiple habeas corpus petitions, such as those before us, prejudice to the petitioners is obviously of no concern. For one thing, these proceedings do not involve adjudications of guilt, but only the legality of petitioners’ confinement as related to this Court’s sentence review.⁶ For another, petitioners themselves, rather than the prosecuting authority, have sought consolidated consideration.

[2] Considerations of judicial economy, then, are alone relevant here. As to these, economies become attenuated, and the potential benefits less attractive, as the disparity between legal and factual issues increases.⁷ Multiple party joinder is a function of the facts and circumstances of each case, with the determination in each necessarily resting within the sound discretion of the court.⁸ In the final analysis, a balancing test is employed to take into account the relative advantages and disadvantages attendant to joint consideration of the common and any noncommon claims presented.

Brown and the other petitioners in this proceeding—the one hundred and twenty-three inmates on “death row”—premise their joint filing for habeas corpus relief on alleged judicial economies which will flow from our considering in one proceeding allegedly common issues of law and fact. Those economies are not readily apparent in considering the several petitions, as the facts relevant to each vary significantly. Petitioners’ appendices, and their request for a special master to develop facts further, bear this out. Petitioners’ cases are even in different stages of the appellate

1. *Porter v. Porter*, 60 Fla. 407, 53 So. 546 (1910).

2. For a short overview of the history of the writ of habeas corpus, see *State ex rel. Deeb v. Fabianski*, 111 Fla. 454, 152 So. 207 (1933).

3. *Price v. Johnston*, 334 U.S. 266, 269, 68 S.Ct. 1049, 1052, 92 L.Ed. 1356 (1948).

4. See *State ex rel. Williams v. Purdy*, 242 So.2d 498 (3d DCA), appeal dismissed, 248 So.2d 171 (Fla. 1971), citing *In re Kosopud*, 272 F. 330 (N.D. Ohio 1920) and *Riley v. City and County of Denver*, 137 Colo. 312, 324 P.2d 790 (1958).

5. See *Abbott v. State*, 334 So.2d 942 (3d DCA 1976), cert. denied, 345 So.2d 420 (Fla. 1977), and cert. denied, 431 U.S. 908, 97 S.Ct. 2926, 53 L.Ed.2d 1064 (1977); *Tifted v. State*, 334 So.2d 91 (Fla.3d DCA 1976), cert. denied, 344 So.2d 327 (1977).

6. See Note, *Multiparty Federal Habeas Corpus*, 81 Harv.L.Rev. 1482, 1483 (1968).

7. See *id.* at 1488.

8. See *Menendez v. State*, 368 So.2d 1278 (Fla. 1979); *Stripling v. State*, 349 So.2d 187 (Fla.3d DCA 1977), cert. denied, 359 So.2d 1220 (1978).

process. Joined together are persons whose appeals from sentences of death are pending in this Court and persons whose sentences have already been affirmed by this Court—some more than once. The first category of petitioners have filed requests which are obviously premature.

The economies petitioners assert only become manifest if we rule precisely in the manner petitioners have urged—a presumptuous view of the merits of the cause. The fact of the matter is that to consider Brown's claim along with each of the others would plainly prove more unwieldy than economical.⁹ Unlike *In re Baker*, 267 So.2d 331 (Fla. 1972),¹⁰ this case does not involve the routine application of a previously adjudicated constitutional issue to numerous persons who are, in reality, similarly situated. The claims for relief in these petitions present for our analysis new and unresolved constitutional issues, some applicable to one group of petitioners and some applicable to others.¹¹

The joinder here is manifestly designed, at best, to curtail all executions in Florida on legal grounds not yet adjudicated or, at least, to suspend the imposition of any lawful sentence until new legal issues are resolved. The latter objective, of course, has already been achieved. To allow a joinder under these circumstances in future cases would distort habeas corpus beyond recognition and create a pernicious precedent in capital cases. We decline to approve this

precedent. There is no justification for joinder in situations such as this.

[3] To avoid absurd technicalities, however, we decline to treat each petition as if it were separately filed and enter a separate order or opinion on each. Rather, our disposition of Brown's petition effectively disposes of all claims for relief of those petitioners who have joined with Brown. In the future, attempts to create a class action habeas corpus proceeding in situations such as this will be rejected summarily.

II

Turning to the legal issues presented, we perceive that petitioners' several constitutional claims all emanate from their assertion that we have "engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal." This information allegedly includes pre-sentence investigations, psychiatric evaluations or contact notes made in the corrections system after conviction, and psychological screening reports made after conviction by corrections personnel.¹² The receipt of this information, petitioners assert generally, has led to a rash of constitutional violations ranging from a denial of due process in individual cases where information was received, on the one hand, to a pervasive violation of *Gardner v. Florida*, 430 U.S.

9. *State ex rel. Williams v. Purdy*, 242 So.2d 498 (3d DCA), appeal dismissed, 248 So.2d 171 (Fla. 1971) (class action not an appropriate remedy in habeas corpus proceeding). We note that the applicability to habeas corpus of the rules concerning joinder and class actions has engendered much controversy in the federal courts. *Harris v. Nelson*, 394 U.S. 298, 294 n.5, 89 S.Ct. 1082, 1088 n.5, 22 L.Ed.2d 281 (1969); *United States ex rel. Sero v. Preiser*, 506 F.2d 1115 (2d Cir. 1974), cert. denied, 421 U.S. 921, 95 S.Ct. 1587, 43 L.Ed.2d 789 (1975); *Adderly v. Wainwright*, 58 F.R.D. 389, 400 (M.D.Fla. 1972). See generally Note, *Multiparty Federal Habeas Corpus*, 81 Harv.L.Rev. 1482 (1968).

10. In *Baker*, this Court, pursuant to the United States Supreme Court's mandate in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d

346 (1972), imposed life sentences on the class of persons previously sentenced to death who had not been resentenced as of that date.

11. The disparities are highlighted by the state's motion to dismiss those of the petitions which allege no direct "taint" in our review of prisoners' sentences.

12. Petitioners also assert that we have seen and were prejudicially affected (1) by one reference in a letter to the Court that one convict refused to submit to a psychiatric report, (2) by the mention in letters to the Court that there exist probation and parole violation reports for two convicts, and (3) by the mention in another letter to the Court that there exists a prison classification and admission summary for one convict.

349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), in all capital cases reviewed and affirmed by the Court, on the other hand. In short, petitioners contend that our alleged misconduct requires our invalidation of all death sentences imposed or approved in Florida, and by necessary implication, that we declare Florida's death penalty statute invalid and unconstitutional in its operation.

Despite strident characterizations of our receipt of these materials,¹³ and notwithstanding the vigor and pith of the hypotheses on which petitioners depend, the doctrines of constitutional law here argued are singularly unpersuasive. Even if petitioners' most serious charges were accepted as true, as a matter of law our view of the non-record information petitioners have identified is totally irrelevant either to our appellate function in capital cases as it bears on the operation of the statute, or to the validity of any individual death sentence.

Florida's death penalty statute, section 921.141, Florida Statutes (1979), directs that a jury and judge, not this Court, must weigh the evidence of aggravating and mitigating circumstances delineated in the statute to determine whether death is an appropriate sentence. The jury performs that function only to recommend a sentence to the trial judge. It then becomes the responsibility of the trial judge to weigh evidence of aggravating and mitigating circumstances in order to arrive at a reasoned judgment as to the appropriate sentence to impose.¹⁴

[3] This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in *Elledge v. State*, 346 So.2d 998 (Fla. 1977),

where we remanded for resentencing because the procedure was flawed—in that case a nonstatutory aggravating circumstance was considered. See also *Brown v. State*, 381 So.2d 690 (Fla. 1980); *Kampff v. State*, 371 So.2d 1007 (Fla. 1979).

The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all past capital cases to determine whether or not the punishment is too great. *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *State v. Dixon*, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. See *Mulloy v. State*, 382 So.2d 1190 (Fla. 1979); *Burch v. State*, 343 So.2d 831 (Fla. 1977); *Jones v. State*, 332 So.2d 615 (Fla. 1976).

[4.5] Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances. Our sole concern on evidentiary matters is to determine whether there was sufficient competent evidence in the record from which the judge and jury could properly find the presence of appropriate aggravating or mitigating circumstances. If the findings of aggravating and mitigating circumstances are so supported, if the jury's recommendation was not unreasonably rejected,¹⁵ and if the death sentence is not disproportionate to others properly sustainable under the statute, the trial court's sentence must be sustained even though, had we been triers and weighers of fact, we might have reached a different result in an independent evaluation.

It is not the function of this court to cull through what has been listed as aggra-

13. At oral argument, counsel for petitioners charitably described our receipt of these materials as "an understandable effort to be fully informed."

14. The relationship of the judge's responsibility to the jury's, about which much has been said in our opinions, is not germane here.

15. *Tedder v. State*, 322 So.2d 908 (Fla. 1975).

vating and mitigating circumstances in the trial court's order, determine which are proper for consideration and which are not, and then impose the proper sentence. In accordance with the statute, the culling process must be done by the trial court.

Mikenas v. State, 367 So.2d 606, 610 (Fla. 1978). Accord, *Hargrave v. State*, 366 So.2d 1 (Fla. 1978), cert. denied, 444 U.S. 919, 100 S.Ct. 239, 62 L.Ed.2d 176 (1979).

The record of each proceeding, and precedent, necessarily frame our determinations in sentence review. Our opinions, of course, then expound our analysis. Factors or information outside the record play no part in our sentence review role. Indeed, our role is neither more nor less, but precisely the same as that employed by the United States Supreme Court in its review of capital punishment cases. Illustrative of the Court's exercise of the review function is *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

Petitioners' contentions in this proceeding are essentially grounded on *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977). *Gardner* stands for the proposition that a sentence of death may not be imposed (note the word "imposed") to any extent on non-record, unchallengeable information. *Id.* at 362, 97 S.Ct. at 1206. Since we do not "impose" sentences in capital cases, *Gardner* presents no impediment to the advertent or inadvertent receipt of some non-record information. The Kentucky Supreme Court explained the distinction which has eluded petitioners in *Ex Parte Farley*, 570 S.W.2d 617 (Ky. 1978), responding to the very assertion that is made here concerning the review of "non-record" materials in capital cases:

Every opinion from a case book, every text or treatise, every law review article, every philosophical, historical or religious document a judge might see fit to read and consider, including the Holy Bible, is a tangible source of information from which he may pick and choose in arriving at a judgment.

• • • • •

There are obviously differences between individualized information pertaining to the defendant personally, which is to be considered by a trial judge in fixing a sentence, and the impersonal data that may be used by an appellate court in determining whether the judgment of a trial court is or is not in line with what has been done in comparable cases.

• • • • •

It seems to us that the difference is quite fundamental. If a judge or jury deciding one's fate is going to consider reports of what other people say about him, certainly he should be entitled to see them. "The risk that some of the information accepted in confidence may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest." *Gardner v. Florida*, *supra*, at 430 U.S. 359, 97 S.Ct. 1205. But we are not the sentencing court. In any given case before us we intend to comply with the statutory request to include in our decision a reference to those similar cases that have been taken into consideration. Presumably, however, the petitioners want to know not only what will be taken into consideration, but what will not, and to know it in advance, so that they can urge upon us what to choose and what to avoid.

• • • • •

We do not find it possible to believe that in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court of the United States meant to lay down a principle so pervasive as to require an appellate court to lay out for inspection by the appellant, even in a capital case, all of the information in its hands from which it may seek perspective and guidance in reviewing the propriety of his sentence. We therefore hold that *Gardner* does not apply.

Id. at 625 27 (footnote omitted).

It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to

or considered by the judge, the jury, or counsel, plays no role in capital sentence "review." That fact is obviously appreciated by the United States Supreme Court, for it very carefully differentiated the sentence "review" process of appellate courts from the sentence "imposition" function of trial judges in *Proffitt* and in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

A remaining question is whether the reading of non-record documents would so affect members of this Court that they could not properly perform their assigned appellate functions. Plainly, it would not. Just as trial judges are aware of matters they do not consider in sentencing, *Alford v. State*, 355 So.2d 108 (Fla.), cert. denied, 436 U.S. 935, 98 S.Ct. 2835, 56 L.Ed.2d 778 (1978), so appellate judges are cognizant of information that they disregard in the performance of their judicial tasks.¹⁶

The upshot of this is that petitioners' claims are untenable.

III

We cannot pass this opportunity to put this case in a more rational perspective than it has been accorded by counsel and the

16. At oral argument on the joint petitions, counsel clarified petitioners' "proportionality taint" argument. He conceded that appellate judges receive and review all types of non-record information in the course of their duties, and that there is no impropriety in that occurring. He stated, moreover, that one constitutionally infirm decision by this Court would not itself skew the entire process by which we guarantee proportionality review in capital cases, so as to invalidate all other death sentences or the operation of the statute. He asserted, rather, that a systematic pattern of constitutionally defective review would be required for the relief requested, and he claimed to have found that pattern in the Court's having received in several cases, by request or otherwise, the "tainted" materials which were never displayed to counsel. As we view the case, of course, appellate review can never be compromised, in the constitutional sense required by *Proffitt*, by the receipt of any quantity of non-record information. Cf. *Goodman v. Olsen*, No. 45,356 (Fla. July 30, 1976), cert. denied, 430 U.S. 945, 97 S.Ct. 1579, 51 L.Ed.2d 792 (1977), where the United States Supreme

Court emerged from society's continuing wrangling over the moral and social justification for capital punishment. Regrettably, the thunderous emanations of this great debate, and the manner in which this joint petition was presented to the Court, have cast a pall on the integrity of the painful process by which this Court attempts to deal with the responsibility it has been assigned. It seems to us both unwarranted and unseemly to vilify those who endeavor to follow the constitution; we are, after all, the messengers, and not the message.

Florida's death penalty statute has been held constitutional time and time again.¹⁷ We are obliged to apply it so long as the citizens of this state deem it an appropriate punishment for select acts of criminality, and so long as the United States Supreme Court tolerates its use. Views on the subject can always be addressed to the Florida legislature or to the people of Florida, but attempts to pervert judicial processes, or to castigate the judiciary, benefit no one in the resolution of this societal debate.

The petitions of Brown and the others for writs of habeas corpus and for other extraordinary relief are denied. The motion for

Court denied review of an order of this Court which had rejected a request to invalidate a decision of this Court allegedly made on the basis of improper, non-record information.

17. We cannot help but observe that the operation of capital punishment laws has been dependent upon a changing set of procedural principles, see *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2964, 57 L.Ed.2d 973 (1978); *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), which have imposed shifting, supervisory standards on state high courts. The "tainted" information we are charged with reviewing was, as counsel concedes, in every instance obtained to deal with newly articulated procedural standards. It would be ironic indeed if petitioners were successful in their assertion that our statute operates unconstitutionally because this Court has acted promptly from time to time to respond to new directives from the Supreme Court as to what procedures are required to make the statute operate in a constitutional manner.

appointment of a special master and sundry other relief is denied. The stays of execution for Carl Ray Songer and Lenson Hargrave are dissolved.

No petitions for rehearing will be entertained.

SUNDBERG, C. J., and ADKINS, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., concur.

BOYD, J., concurs in result with an opinion.

BOYD, Justice, concurs in result with an opinion.

I am convinced that no member of this court was influenced by any extraneous materials.

Although I don't agree with all the language in the majority opinion, I concur in the result.

Alvin Bernard FORD,
Petitioner/Appellant,

v.

STATE of Florida, Respondent/Appellee.

Nos. 61440, 61450.

Supreme Court of Florida.

Dec. 4, 1981.

Following conviction of murder in first degree and sentencing of defendant to death, the Circuit Court, Broward County, J. Cail Lee, J., denied motion for postconviction relief. Defendant appealed and filed original petition for writ of habeas corpus and application for stay of execution. The Supreme Court held that: (1) overwhelming nature of aggravating circumstances precluded likelihood that counsel's alleged omissions could have been prejudicial, and (2) there was not sufficient showing that any of grounds asserted in habeas corpus petition would likely have affected outcome of appeal.

Order accordingly.

1. Criminal Law — 998(5)

Error that may justify reversal on direct appeal will not necessarily support collateral attack on final judgment.

2. Criminal Law — 1023(2)

Finality as important element of criminal justice system should be abridged only when more compelling objective appears, such as insuring fairness and uniformity in individual adjudication.

3. Criminal Law — 998(2)

Where alleged grounds for relief from criminal conviction were known at conclusion of trial and could have been, but were not, raised on direct appeal, collateral attack through postconviction relief motion was not appropriate remedy. West's F.S.A. Rules Crim.Proc., Rule 3.850.

4. Criminal Law — 641.13(1)

Standard by which effectiveness of counsel is to be measured is whether counsel was reasonably likely to render and rendered reasonably effective assistance.

5. Criminal Law — 998(5)

To establish prejudice warranting postconviction relief, there must be serious doubt of defendant's guilt.

6. Criminal Law — 998(8)

Overwhelming nature of aggravating circumstances precluded likelihood that counsel's alleged omissions could have been prejudicial to postconviction relief petitioner.

7. Habeas Corpus — 85.5(11)

Where habeas corpus petitioner who asserted ineffective appellate counsel failed to meet his burden of showing substantial and serious deficiency measurably below that of competent counsel and failed to make sufficient showing that any of grounds alleged would have likely affected outcome of appeal, petition was denied.

Laurin A. Wollan, Jr., Tallahassee and
Raymond W. Russell, Fort Lauderdale, for
petitioner/appellant.

Jim Smith, Atty. Gen. and Joy B. Shearer, Asst. Atty. Gen., West Palm Beach, for respondent/appellee.

PER CURIAM.

We have for consideration an appeal from an order of the circuit court denying a motion for post-conviction relief, an original petition for writ of habeas corpus, and an application for stay of execution.

Petitioner Ford was convicted of murder in the first degree. A separate sentencing proceeding was held before the trial jury, which recommended that petitioner be sentenced to death. The trial judge, in accordance with the jury's recommendation, sentenced him to death. The judgment and sentence were affirmed by this Court. *Ford v. State*, 374 So.2d 496 (Fla.1979).

The Supreme Court of the United States denied a petition for writ of certiorari. *Ford v. Florida*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner has also challenged his conviction by filing a habeas corpus proceeding in this Court, in which he joined 122 other persons under sentence of death, challenging this Court's purported review of extra record material in capital appeals. Relief was denied in *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981), cert. denied, --- U.S. ---, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

Petitioner further challenged his conviction and sentence in a motion for post-conviction relief filed in the circuit court. Petitioner has appealed from the order denying this motion for post-conviction relief. The state has filed a motion to quash this appeal and a motion to affirm the trial judge.

Petitioner has also filed with this Court a petition for writ of habeas corpus arguing that counsel for him failed to present to this Court meritorious issues relating directly to the validity of the conviction and sentence in this case and thereby deprived him of a meaningful direct appeal in contravention of the sixth, eighth, and fourteenth amendments to the Constitution of the United

States. He asks that we grant him a belated appellate review from the judgment and death sentence of the trial court.

[1] Rule 3.850, Florida Rules of Criminal Procedure, authorizes the use of post-conviction relief procedures to challenge a once final judgment and sentence in limited instances, and for limited reasons. An error that may justify reversal on direct appeal will not necessarily support a collateral attack on the final judgment. *Witt v. State*, 387 So.2d 922 (Fla.1980), citing *U. S. v. Addonizio*, 442 U.S. 178, 99 S.Ct. 2235, 60 L.Ed.2d 805 (1979).

[2] Finality is an important element of the criminal justice system. This doctrine of finality should be abridged only when a more compelling objective appears, such as insuring fairness and uniformity in individual adjudication. *Witt v. State*.

[3] Petitioner's motion to vacate filed with the trial court alleged five grounds for relief. Only one of these—the claim of ineffective assistance of trial counsel—was properly raised. The other four issues pertaining to the admissibility of the confession, jury selection under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), jury instructions during the sentencing phase, and the standard of proof used in the sentencing phase, were all matters known at the conclusion of the trial which could have been, but were not, raised on direct appeal. Accordingly, collateral attack through a Florida Rules of Criminal Procedure 3.850 motion was properly determined by the trial court not to be an appropriate remedy pursuant to this Court's decisions in *Witt v. State* and *Hargrave v. State*, 396 So.2d 1127 (Fla.1981). See also *Wainwright v. Sikes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977).

[4] The standard by which the effectiveness of counsel is to be measured is whether counsel was reasonably likely to render and rendered reasonably effective assistance. *Meeks v. State*, 382 So.2d 673 (Fla.1980). In *Knight v. State*, 394 So.2d 997 (Fla.1981), this Court set out a four-pronged test for determining whether there was reasonably effective assistance:

1. The specific act or omission upon which the claim is based must be detailed in the appropriate pleading.

2. The defendant has the burden to show it was a substantial and serious deficiency measurably below that of competent counsel.

3. The defendant has the burden to show that under the circumstances of his case, he was prejudiced to the extent that there is a likelihood that the deficient conduct affected the outcome of the court proceedings.

4. If the defendant shows this, the state may rebut by showing beyond a reasonable doubt that there was no prejudice in fact even if a constitutional violation was involved.

[5, 6] In his 3850 motion to vacate petitioner presented four categories of "specific omissions" to support the claim of ineffectiveness of trial counsel: (i) failure to adequately present the motion to suppress petitioner's statement made to law enforcement officers after he indicated he wanted to consult an attorney, (ii) failure to adequately prepare for trial, (iii) failure to adequately present issues during the guilt phase of the trial, and (iv) failure to adequately present or preserve issues during the sentencing phase of the trial. After a careful review of the record of proceedings on the motion to vacate, particularly the testimony of the lawyer witnesses called by petitioner, we conclude that either the alleged deficiencies have not been demonstrated to be substantial and serious, measurably below conduct expected of competent counsel or that petitioner was not prejudiced to the extent that there is a likelihood that the deficient conduct affected the outcome of petitioner's trial. For example, insofar as the petitioner's statement is concerned, it is far from clear that the statement was inadmissible under the state of the law existing at the time of trial. *Witt v. State, Meeks v. State*. Furthermore, petitioner's statement only admitted his presence and participation in the robbery. It denied participation in the shooting. There was abundant evidence apart from the confession, some by

eye witnesses, to place him at the scene as a participant. Even disregarding petitioner's confession there was overwhelming evidence of guilt. To establish prejudice, there must be a serious doubt of the defendant's guilt. *Canary v. Bland*, 583 F.2d 887, 894 (6th Cir. 1978). To the same extent the purported deficiencies at the sentencing phase can be readily attributed to tactics of counsel under the circumstances of the case. In any event, the overwhelming nature of the aggravating circumstances precludes any likelihood that counsel's alleged omissions could have been prejudicial to petitioner.

Accordingly, applying the standard of *Meeks and Knight* we agree with the finding of the trial court that "the assistance of his counsel was . . . as effective as it could have been expected to be done under these circumstances."

[7] Petitioner raises the following grounds in asserting ineffective appellate counsel in his petition for writ of habeas corpus: (i) failure to raise the issue of denial of assistance of counsel during interrogation, (ii) failure to raise denial of petitioner's right to a fair and impartial jury under *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), (iii) failure to attack the adequacy of the trial court's instruction to the jury at the sentencing phase, (iv) failure to challenge findings of aggravating and mitigating circumstances, and (v) failure to appeal non-disclosure of a witness. Applying the four-pronged test of *Knight v. State* to each of these claims, we find that petitioner has failed to meet his burden of showing a substantial and serious deficiency, measurably below that of competent counsel. Even if we assumed this aspect of the *Knight* test were met, there is not a sufficient showing that any of these grounds would likely have affected the outcome of the appeal.

The order of the trial court denying the motion to vacate is affirmed, the petition for writ of habeas corpus is denied, and the application for stay of execution is denied. No petition for rehearing will be entertained.

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SUNDBERG, C. J., and ADKINS, BOYD,
OVERTON, ALDERMAN and Mc-
DONALD, JJ., concur.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 81-6663-Civ-NCR

ALVIN BERNARD FORD

Petitioner

-vs.-

CHARES G. STRICKLAND,
JR., etc., et al

Respondents

FINDINGS OF FACT AND
CONCLUSIONS OF LAW

'81 Oct 10 - 09

The facts are presented in terse form in the opinion of
the Supreme Court of the State of Florida, as follows:

On the morning of July 21, 1974, Ford and three others, who had decided to commit a robbery, went with weapons to a Red Lobster Restaurant in Fort Lauderdale, Florida. During the robbery, after two people had escaped from the restaurant, Ford's three accomplices realized the police would soon arrive and so left the scene of the crime. Ford remained in order to effectuate the theft of some \$7,000 from the restaurant's vault and was confronted by Officer Dimitri Walter Ilyankoff of the Fort Lauderdale Police Department. Ford shot the policeman three times, wounding him fatally. Appellant escaped in the decedent's police car, and his fingerprints were later found in the vehicle after it had been abandoned. He was arrested in the vicinity of Gainesville, Florida, and was returned to Fort Lauderdale for indictment and trial.

Ford v. State, 374 So. 2d 496, 497 (Fla. 1979).

The Supreme Court of Florida did not go into much detail and, as stated in the Supreme Court's opinion, the circumstances of the killing are somewhat less than explicit. What happened was that Ilyankoff arrived on the scene and was shot twice in the abdomen without warning. While lying outside the back door of the Red Lobster Restaurant, defendant Ford then ran out of the restaurant to the police cruiser, apparently realizing that his accomplices had left in the escape vehicle without him. There were no keys in the

cruiser so Ford returned to the police officer. Ilyankoff had, in the meantime, radioed for assistance and had struggled in an effort to get up. Defendant ran back to the police officer and asked him for his keys. Ilyankoff then was shot in the back of the head, at close range by defendant Ford; at that point Ford took the keys and escaped in the police cruiser at high speed. Not only was there an eye witness, an employee of the restaurant cowering in a utility room at the back of the restaurant observing it all through a slatted door only about five feet from the officer, but Ford's movements were seen by a nearby resident and the call for help was, of course, heard on the radio as well as taped. It seems unnecessary to go into more elaborate details about the slaying or the corroborating evidence for purposes of this order.

FINDINGS AND CONCLUSIONS

Defendant is present, counsel are present.

I am going to take the issues as they were raised in the petition for writ of habeas corpus filed by the defendant below and petitioner in this court, in the case of Alvin Bernard Ford versus Charges G. Strickland, et al., 81-6663-Civ-NCR.

The first issue raised was the issue of confrontation of witnesses. The ground asserted is that the petitioner was denied the right to confront witnesses, and the court finds no merit in that contention, for a number of reasons.

The opportunity existed for the defendant to call Ms. Buchanan in this case as a witness. Whether or not defense counsel would have been successful in treating Ms. Buchanan

as an adverse witness, of course, is problematical, and I shall not indulge in speculation as to that ruling, nor do I find it would rise to the constitutional level required for the issuance of the writ, even if the state trial court's ruling was wrong. Besides, the matter has been treated additionally by the Supreme Court of Florida in its holding.

I emphasize again this court does not sit as an appellate tribunal to review the findings of the Supreme Court of Florida or to second-guess the trial court judge, but only in the area prescribed by the Congress under 28 U.S.C. § 2254.

As to the alleged issue of the non-disclosure of exculpatory evidence, I can't find in this record that the defendant has carried the burden in the slightest on this point.

I might add Ms. Buchanan was found by the Supreme Court of Florida to be impeached. Ford v. State, 374 So. 2d 496, 499 (Fla. 1979). That applies, I think, not only to issue A but certainly has some bearing on issue B. But there's been a total failure on the part of the defendant to carry this point, issue B.

Issue C is the claimed denial of the right to assistance of counsel in connection with the Miranda warnings.

In the first place, it was not a statement as to doing the shooting in connection with the robbery but only as to the robbery. There was such an overwhelming amount of evidence establishing the complicity of the defendant in the robbery at the Red Lobster that it would have been harmless error by any standard. Additionally, Wainwright v. Sykes, 433 U.S. 72 (1977) applies.

The allegation of ineffective assistance of counsel isn't cause under Lumpkin v. Ricketts, 551 F.2d 680, 682-83 (5th Cir. 1977). This court does not find a showing of ineffective counsel on this point. Mr. Adams raised it in the motion to suppress and he lost the ruling.

Neither does the court find that Edwards v. Arizona, 101 S. Ct. 1880 (1981), should be applied retroactively. Miranda wasn't and there seems no reason to do so from its progeny. Miranda v. Arizona, 384 U.S. 436 (1966). No persuasion has been presented that such should be the case, and the court rejects that argument. That point is without merit.

Issue D relates to the claim of a Witherspoon violation. Witherspoon v. Illinois, 391 U.S. 510 (1968). Judge Lee went over this matter more than once with the jury. To be sure, it probably would have been better if he had conducted inquiries with each juror individually. As counsel suggested at the hearing Saturday, we probably wouldn't even have the issue before us had he done so. Perhaps with hindsight he would have done it differently.

It will be six years on Wednesday since this trial commenced and the jury was selected; I think that ought to be considered by all courts at this stage in evaluating what happened then. Was what the trial judge did during the *voire dire* such error as to require the issuance of the writ? This court doesn't find so. The court finds that Witherspoon was substantially complied with. Again, Wainwright v. Sykes, 433 U.S. 72 (1977), applies and the court does not find ineffective assistance of counsel in that regard.

In the sentencing phase instructions to the jury, here again Wainwright v. Sykes controls. The court does not find ineffective assistance of defendant's counsel in this matter.

Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), was decided in September, just prior to the split of the circuits with a very vigorous -- vehement, I should say -- dissent by Judge Coleman. Id. at 1378. However, petition

for rehearing en banc was denied four days ago. Whether or not that was influenced by the split of the circuits is a matter of no relevance to this court.

At first blush it would appear that the instruction given in Washington v. Watkins was in the same format as that given in this case. Id. at 1367-68. I frankly am somewhat puzzled by the majority decision in Washington v. Watkins, but they decided and I accept it. However, I think there is a valid distinction: Mississippi has sentencing by a jury, or at least a jury makes a binding sentence recommendation; Florida does not. Florida has sentencing of death by a judge and the jury's verdict is only advisory.

The Eleventh Circuit in Henry v. Wainwright, No. 80-5184 (11th Cir. Nov. 12, 1981), supports the court's conclusion in this regard. Henry does not fit this case on the merits because at the Henry trial there was sanctioning of this jury's consideration not only of the statutory aggravating factors but anything else the jury determined to be aggravating. Id. slip op. at 12914-15. That was not the situation in the instant trial at all.

It is significant that in Henry v. Wainwright, Judge Reed in the Middle District, granted the writ if the state trial court failed to provide a second sentencing within 90 days of the court's order. Id. slip op. at 12913. The Eleventh Circuit affirmed the judgment of the District Court.

Let's look at the record in the instant case because it applies to that. For example, Judge Lee concluded in 1975 that: "There are sufficient and great aggravating circumstances which exist to justify the sentence of death. Indeed, it is difficult to imagine a crime which is more heinous, atrocious and cruel and under our existing law it is deserving of no sentence but death." Ford v. State, 374 So. 2d 496, 502 n.1 (Fla. 1979).

Less than two weeks ago, November 25, 1981, at the hearing on motion for post-conviction relief, after the rendering of these opinions, Judge Lee stated at page 249 of that hearing transcript:

I am satisfied on the presentation here today that the evidence was overwhelming of Mr. Ford's guilt, that he was guilty then and he remains guilty now, and that the imposition of the death sentence was then and is now a proper one to have imposed, and indeed the facts of the case allowed for none other.

Even if the court assumed that Washington v. Watkins compelled the issuance of the writ; the authority of Henry would indicate granting the writ if the state trial court failed to provide a second sentencing hearing within ninety days. Such an order would, in view of Judge Lee's comments only twelve days ago, be a straining of federalism to an extreme degree. Frankly, it would almost be an insult to Judge Lee. Judge Lee certainly deserves no such insult. Just as equity does not require a vain act to be done, I see nothing in view of these circumstances that would dictate that such a vain procedure be required of Judge Lee. Consequently, the court finds no merit in issue E.

Issue F claims an unconstitutional shifting of the burden at the penalty phase of the trial.

I must say petitioner must not have thought much of this point; he only gave seven-and-a-half lines to it in the petition. I don't think much of it, either. I think Proffitt v. Florida, 428 U.S. 242 (1976) is sufficient itself to reject the claim.

Issue G is a claim that the Florida Supreme Court failed to set aside the death sentence despite the substantial erosion of the basis for the death sentence. Here again,

I can't find that the Supreme Court of Florida ignored, or that the sentencer ignored, non-statutory mitigating factors. Even though some of the aggravating factors were set aside by the Supreme Court of Florida in its opinion, still the determination of that matter on aggravating/mitigating factors was rejected by the Supreme Court of the United States in Proffitt v. Florida, 428 U.S. at 255.

That will also apply to issue H, the alleged failure of the Supreme Court of Florida to assure imposition of the death penalty fairly and consistently. All defendant is doing here is quarreling with the Florida Supreme Court; that doesn't rise to a constitutional basis. It is rejected on the basis not only of Proffitt, but also the Fifth Circuit case of Stephens v. Zant, 631 F.2d 397 (5th Cir. 1980), where the court referred to the Supreme Court of Georgia stating that "The Supreme Court of Georgia is the ultimate authority on the law of Georgia and we are not permitted to question its interpretation of that State's statutes. We must therefore treat [aggravating] circumstance (2) as it is interpreted by the Georgia Supreme Court." Id. at 405-06 (citations omitted). So must this court as to the Florida Supreme Court.

Issue I, the alleged Florida Supreme Court practice of reviewing psychiatric material or other material with reference to the defendant without the defendant or the defendant's attorney being aware of it.

One, this is nothing but speculation that such occurred in the defendant's file. There's been no evidence presented and admittedly by defendant none could be. There were no letters of transmittal or anything at all to suggest that such material existed in the petitioner's file -- only

that it existed in other files. Therefore defendant asked this court to speculate that the Supreme Court of Florida had done similarly in petitioner's case, as well. Well, it clearly is without merit.

Additionally, defendant was one of a class of plaintiffs who sued the Supreme Court on this. They lost and certiorari was denied by the United States Supreme Court on November 2, 1981. Brown v. Wainwright, 392 So.2d 1327 (Fla. 1981), cert. denied, No. 80-6434 (Nov. 2, 1981).

We then move to the alleged ineffective assistance of counsel matter which was heard today. Let me first state this about defendant's trial lawyer, Mr. Adams. Perhaps it is a little difficult for a judge to evaluate effective assistance of counsel in a vacuum, especially when the judge has had that lawyer practice before him, has observed him in action, knows not only from observation but also by reputation of the lawyer's skill in criminal defense matters.

The court has always found Mr. Adams to be extremely effective counsel versed in the law and one who never forgets that the purpose is to win, if I may put it that way, in the trial court while at the same time preserving as is necessary matters for any appellate review.

One might be a little more critical of someone such as one of the lawyers called as defense witnesses before Judge Lee, who had only tried one criminal case; that lawyer was called to criticize Mr. Adams' representation which is among the most classic instances of Monday morning quarterbacking I have ever seen. The court simply does not have perhaps the same willingness to nitpick and flyspeck the actions or inactions of defendant's counsel because of the court's own observations; in fact, the court will take judicial notice

of the experience of Mr. Adams. Additionally, the record is replete today with his background. A trial attorney has other things in mind called trial tactics, rather than fighting every little battle that can be fought throughout a proceedings. It is easy for lawyers to sit back six years later and say this "i" wasn't dotted, that "t" wasn't crossed just so or the slant of the crossing could have been better. That's hardly ineffective assistance of counsel. And that is the way most of the questioning has struck me today.

I must say I am glad that I had this evidentiary hearing. on Saturday, I concluded there was no reason to have it. The more I heard today, the more convinced I was of that. I shall enumerate:

The three witnesses set forth in the transcript of the post-conviction state court hearing basically boil down to this: Mr. Jepeway's describing Mr. Adams' representation as inadequate, but admitting he hadn't read the transcript. He didn't know what the Miranda statement was that he was complaining about having been admitted; if he had, he would have been aware that the statement was only as to the robbery and the defendant denied any involvement with the murder. The things Mr. Jepeway didn't know were rather significant.

The second lawyer who was called had only one criminal case in the way of experience. The lack of qualification of this witness makes "expert" status dubious in that type of hearing. In any event, the lack of qualification would cause an excess of ninety-nine percent discount of the opinion.

The third one, Mr. Von Zampft, had read the transcript, and has some experience; he presented more credible second-guessing. However, even he concluded representation of defendant to satisfy his criticism would have made no difference on the question of guilt or innocence. In other

words, even the defendant's most credible expert concluded at the post-conviction relief hearing, some six years after the trial, the defendant would still have been guilty. This represents a rather obvious recognition of the overwhelming mass of evidence against the defendant. He did think it might have made a difference in the jury recommendation. That's pure speculation, of course.

In view of Judge Lee's findings, both shortly after the trial in 1975 and again two weeks ago, to speculate that the jury would have come back with a different recommendation and then speculate that Judge Lee would have changed his sentence is not just inference on inference, it's speculation on top of speculation.

I think it is significant at this point to point out that Judge Lee has been a judge in criminal court matters for many years; practiced criminal law before that, for several years as a criminal defense lawyer, as I recall; and he was a judge of several years' experience at the time this case was tried. Just two weeks ago, he indicated that this is the only time he ever imposed the death sentence.

For the benefit of the Court of Appeals, because they don't live in this community, I think it is safe to say that Judge Lee does not have a reputation as a "hanging judge," whatever that phrase may mean in the public eye, but he does have a reputation as a good judge. The imposition of the death sentence in only this one instance, this case, is significant.

As to the first witness this morning, the pathologist's testimony is rather interesting altho it didn't seem to square with other testimony in the trial. For example, the fact that several minutes elapsed in all this. The defendant

shot Officer Ilyankoff without provocation or warning twice in the stomach; and while he's lying on the ground, the defendant went out to the cruiser because then he needed an escape vehicle; he came back to the officer but in the meantime the officer had called for help three times on his radio; the officer had tried to climb to an upright position. A conversation ensued, albeit brief, between the defendant and Officer Ilyankoff. It was brief because the defendant only wanted the keys to the police cruiser from Officer Ilyankoff. It was also brief because the defendant shot the officer in the back of the head at fairly close range.

The charge before me is that the failure to call Dr. Fatteh was ineffective assistance of counsel. I found most persuasive and credible the testimony of the defense attorney, Mr. Adams, that he didn't want to reinforce all of this in the jury's mind. I agreed with that when he said it because I had already concluded that. I think it would have insulted the intelligence of the jury to present this testimony and then argue that this matter was not atrocious or heinous, just as I frankly felt it insulted my intelligence to present it.

Additionally, Dr. Embry, the medical examiner and a pathologist, performed the autopsy and testified about it.

As more questions were asked of Mr. Adams, the weaker the claim of ineffective assistance of counsel became. It clearly came as a distinct surprise to defendant's lawyers in this court when they were trying to challenge Mr. Adams as to his alleged failure to cross examine Ms. Buchanan, the eye witness, on her having once said that she could only see the lower half of the defendant, when they learned that Mr. Adams had gone out and examined the door. He was doing his best not to let the jury find out that you could clearly see from behind that door. Good trial tactics dictate obviously that the jury be left wondering if one can really

see from inside a louvered door. That's the mark of an experienced trial lawyer.

Dr. Amin's testimony was presented with respect to the claim of ineffective assistance of counsel. I assume Dr. Amin is not trying to corner the market in any capital case where a defendant happens to be black, because Dr. Amin indicated he was the only black psychiatrist in Florida with forensic experience. The basic thrust I could find from the presentation of this evidence was that only a black psychiatrist would have sufficient socio-cultural compatability with this defendant to properly present this in court. I find that is a classic example of reverse racism and bigoted on its face. I would not find such an argument meritorious whether the argument were made in this situation or a reverse situation or in any other analagous situation involving a different racial, or religious, or gender background between the psychiatrist testifying and the defendant.

One could argue with as much force that Dr. Taubel's testimony would be received more favorably by the jury in this case and the judge in this case because he was of the same race. Obviously, that argument is specious as well. I use it only for an example of how vacuous that argument is as presented by the defendants, or at least as I assume the thrust of it to be.

In any event, Dr. Taubel testified. We are talking about December, 1975, six years ago. Dr. Taubel was certainly one of the leading, if not the leading forensic psychiatrist in this community at that time. If calling such a witness amounts to ineffective assistance of counsel, then the law has come to an exotic state quite foreign to my awareness.

As to character witnesses, I note that both the mother and girl friend of the defendant were called at the sentencing phase. I find no substance to a claim of ineffective assistance of counsel as a result of that.

I might say that I think a number of people need to be commended in this matter: Judge Lee, Mr. Satz, our present State Attorney, who was the assistant state attorney who prosecuted this matter, and Mr. Adams, whom I think did a good job.

There are certain matters that the public might wonder about, and I understand why they might. For example, why a case that was tried in December of 1975 didn't get reviewed on this basis until December of 1981. I don't know why the Supreme Court of Florida took three-and-a-half years. I don't know why it took another couple of years for the death warrant to be issued. And I don't know why the Congress of the United States doesn't enact the law that has been introduced setting forth a time limitation within which these writs of habeas corpus must be instituted. If they had, we wouldn't be here on a crash basis.

I was determined I was going to rule on this matter on the merits if I possibly could within the time allowed and I felt from the beginning that was likely to be the case. If at any time I had thought I couldn't finish, I would have stayed the matter. There would have been no choice.

It is true; defendant has a right to appellate review of this court's findings. I iterate that I shall examine the transcript when it's prepared and undoubtedly modify, perhaps amplify wherever this court deems necessary in an effort to provide an order of more assistance to the Eleventh Circuit. I trust they will recognize that it's not as

polished as it might have been. I did not want to delay ruling because I did not want this court to be responsible for any further delay in the matter which has been delayed for too long. Rather clearly, when a crime as heinous and as reprehensible as this one as presented to the jury as in this case, then the execution should have been carried out a long time ago. Society deserves no less.

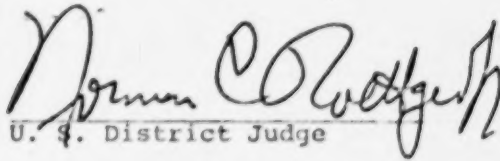
The court's formal finding and conclusion is that the petition for writ of habeas corpus is without merit; it is denied; and the motion for stay is denied.

I have discussed the matter with a judge in the Eleventh Circuit and advised him after the evidence was concluded and arguments have been waived that I had arrived at a conclusion, and informed him of it. He advised that the Court of Appeals would give me time to announce my findings and conclusions from the bench, and then enter a stay in order to permit the defendant to receive an effective appellate review. Apparently, that may well have been done. The execution scheduled for tomorrow morning, I'm advised, has been stayed by the Eleventh Circuit.

The burden is upon the Attorney General's Office of the State of Florida to notify the warden of that. It is not on this court. The Court of Appeals made it abundantly clear that this administrative matter had to be carried out because they were concerned that if they issued the stay after 5:00 o'clock, there might be some difficulty in making sure that the stay was effectively communicated to the warden. That, of course, the Attorney General's Office can do, and I direct that you do that.

WHEREFORE, the petition is denied and the motion for stay is denied.

DONE AND ORDERED this 10 day of December, 1981.


U. S. District Judge

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time prior to defendant's possession." *United States v. Laymon*, 621 F.2d 1051, 1054 (10th Cir. 1980). The Government's proof satisfied this burden under section 1201(a)(1).

The judgment below is affirmed.



Alvin Bernard FORD, Petitioner,

v.

Charles G. STRICKLAND, Jr., Warden,
Florida State Prison; Louie L. Wainwright, Secretary, Department of Offender Rehabilitation, State of Florida;
Jim Smith, Attorney General, State of Florida, Respondents.

No. 81-6200.

United States Court of Appeals,
Eleventh Circuit.

April 15, 1982.

Rehearing Granted April 28, 1982.

Florida prisoner, who had received the death sentence, sought federal habeas relief. The United States District Court for the Southern District of Florida, Norman C. Roettger, Jr., J., denied relief, and petitioner appealed. The Court of Appeals, Roney, Circuit Judge, held that: (1) failure to appeal state trial court's denial of motion to suppress confession precluded consideration of the issue in federal habeas proceedings; (2) there was no constitutional error in instructing jury as to all aggravating and mitigating circumstances; (3) instructions did not improperly preclude consideration of nonstatutory mitigating factors; (4) petitioner failed to establish ineffective assistance of counsel at sentencing; and (5) Florida Supreme Court's reviewing extra-record material in connection with death row inmates other than petitioner would not render petitioner's death sentence unconstitutional.

Affirmed.

Kravitch, Circuit Judge, concurred in part and dissented in part and filed opinion.

1. Criminal Law — 998(3)

Florida defendant's failure to raise an issue which could be asserted on direct appeal precludes consideration of the issue on a motion for postconviction relief. West's F.S.A. Rules Crim Proc., Rule 3.850.

2. Habeas Corpus — 45.3(1)

A state prisoner can forego the opportunity to raise constitutional issues in habeas corpus by deliberately bypassing state appellate procedural rules or by merely failing to follow them without showing both cause for the default and prejudice resulting therefrom. 28 U.S.C.A. § 2254.

3. Habeas Corpus — 25.1(1)

For purpose of *Sykes*, i.e., that absent showing of both cause for noncompliance and actual prejudice habeas corpus relief is barred because of procedural default in state proceedings, "cause" is defined in light of a determination to avoid a miscarriage of justice, while "prejudice" means actual prejudice. 28 U.S.C.A. § 2254.

See publication Words and Phrases for other judicial constructions and definitions.

4. Habeas Corpus — 25.1(8)

The *Sykes* exception to bar on federal habeas relief where state petitioner fails to comply with a state procedural rule did not encompass Florida prisoner's failure to appeal trial court's denial of motion to suppress confession and imposition of *Sykes* forfeiture rule did not constitute a miscarriage of justice as petitioner did not contest accuracy of his statement, which admitted only presence and participation in robbery but denied participation in fatal shooting. 28 U.S.C.A. § 2254.

5. Homicide — 354

That evidence was insufficient to support two aggravating circumstances and that one aggravating circumstance was

based on the same aspect of the crime as another did not compel the conclusion that Florida death sentence was unconstitutionally infected by consideration of extraneous evidence where there were no statutory mitigating circumstances and the sentencer considered only constitutional statutory aggravating circumstances and the properly found aggravating circumstances sufficiently supported the sentence. West's F.S.A. § 921.141.

6. Homicide — 311

Florida trial court did not constitutionally err in instructing jury as to all aggravating and mitigating circumstances permitted by death penalty statute. West's F.S.A. § 921.141.

7. Habeas Corpus — 96

In evaluating state court's death penalty instructions federal habeas court paid careful attention to the words actually spoken to the jury to determine the interpretation that a reasonable juror might give the instruction in question and examined the entire charge to discern whether the issues and law presented were adequate. West's F.S.A. § 921.141; 28 U.S.C.A. § 2254.

8. Habeas Corpus — 45.2(4)

Where some deficiency exists in language of death penalty charge taken as a whole it must be shown that it so infected the entire trial process that a due process violation occurred, before federal habeas relief is warranted. West's F.S.A. § 921.141; U.S.C.A.Const.Amend. 14.

9. Homicide — 311

Although in instructing on aggravating circumstances the trial court stated that the jury was to consider "only the following" and, with regard to mitigating circumstances, stated "you shall consider the following," with the court reading the appropriate statute in both instances, such instructions did not improperly preclude consideration of nonstatutory mitigating factors for death penalty purposes; it was reasonable to conclude that trial judge's perception that nonstatutory factors could be considered was conveyed to the advisory jury. West's F.S.A. § 921.141; U.S.C.A.Const.Amend. 14.

10. Homicide — 354

Crime of capital murder in Florida does not include the element of mitigating circumstances not outweighing aggravating circumstances; aggravating and mitigating circumstances are not facts or elements of the crime but, rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed. West's F.S.A. § 921.141.

11. Homicide — 354

Existence of aggravating or mitigating circumstances is a fact susceptible to proof under a reasonable doubt or a preponderance standard whereas the relative weight of the circumstances is not, and process of weighing such circumstances is a matter for the judge and jury in a death penalty case and, unlike facts, it is not susceptible to proof by either party. West's F.S.A. § 921.141.

12. Habeas Corpus — 92(1)

Where in a capital punishment case state courts act through a properly drawn statute with appropriate standards to guide discretions, federal courts will not undertake a case-by-case comparison of the facts in a given case with the decisions of the state Supreme Court, even though if the federal court were to retry the aggravating and mitigating circumstances it might at times reach different results. West's F.S.A. § 921.141; 28 U.S.C.A. § 2254.

13. Federal Courts — 386

Florida Supreme Court is the ultimate authority on Florida law and a federal habeas court does not sit to question the Florida court's interpretation of Florida statutes. 28 U.S.C.A. § 2254.

14. Habeas Corpus — 92(1)

In reviewing ineffective assistance of counsel claims, a federal habeas court does not sit to second-guess considered professional judgments with the benefit of 20/20 hindsight. U.S.C.A.Const.Amend. 6.

15. Criminal Law — 641.13(1)

That an attorney's strategy may appear wrong in retrospect does not automati-

cally mandate constitutionally ineffective representation. U.S.C.A.Const.Amend. 6.

16. Criminal Law — 641.13(6)

That defense counsel has not pursued every conceivable line of inquiry does not constitute ineffective assistance of counsel. U.S.C.A.Const.Amend. 6.

17. Criminal Law — 1134(2)

Florida Supreme Court's reviewing nonrecord material in connection with death row inmates other than petitioner would not render petitioner's death sentence unconstitutional as function of the Florida court is to review sentences for procedural regularity and proportionality and the court does not impose sentence. West's F.S.A. § 921.141; U.S.C.A.Const.Amend. 14.

18. Habeas Corpus — 85.1(2)

In face of Florida prisoner's unsupported allegations that the state court viewed extra-record material in affirming conviction and sentence, federal habeas court accorded a presumption of correctness to the Florida court's statement that its members properly performed their procedural appellate function in reviewing death sentences. West's F.S.A. § 921.141; 28 U.S.C.A. § 2254(d).

19. Habeas Corpus — 92(1)

Reviewing material extraneous to the record is not a practice to be condoned either by a trial level or appellate court.

Richard H. Burr, III, Nashville, Tenn., Marvin E. Frankel, New York City, for petitioner.

Joy B. Shearer, Asst. Atty. Gen., W. Palm Beach, Fla., for respondents.

Appeal from the United States District Court for the Southern District of Florida.

Before RONEY and KRAVITCH, Circuit Judges, and PITTMAN*, District Judge.

* Honorable Virgil Pittman, U. S. District Judge for the Southern District of Alabama, sitting by

RONNEY, Circuit Judge:

Alvin Bernard Ford was charged with shooting a wounded policeman in the back of the head at close range while fleeing from an armed robbery. Convicted of murder, Ford was sentenced to death in Florida. He appeals the denial of a petition for writ of habeas corpus alleging essentially seven contentions: (1) improper admission of an oral confession; (2) failure of the Florida Supreme Court to require resentencing when it found three of the statutory aggravating circumstances unsupported by the evidence; (3) improper state trial court instructions on mitigating circumstances; (4) failure of the Florida death law to require a finding that aggravating circumstances must outweigh mitigating circumstances beyond a reasonable doubt; (5) failure of the Florida Supreme Court to apply a consistent standard of reviewing the aggravating and mitigating circumstances in the case; (6) ineffective assistance of counsel at sentencing; and (7) review by the Florida Supreme Court of nonrecord materials in death cases, the so-called *Brown* issue. After examining each of these contentions carefully, we affirm the denial of the writ of habeas corpus.

Briefly, the facts giving rise to petitioner's conviction and sentence are as follows. On the morning of July 21, 1974, Ford and three accomplices entered a Red Lobster Restaurant in Fort Lauderdale, Florida, to commit an armed robbery. During the course of the robbery, two people escaped from the restaurant. Fearing police would soon arrive, petitioner's accomplices fled. Ford remained to complete the theft of approximately \$7,000 from the restaurant's vault.

Officer Dimitri Walter Ilyankoff arrived on the scene. Petitioner allegedly shot him twice in the abdomen and, apparently realizing his accomplices had abandoned him, ran to the parked police car. Because there were no keys in the car, Ford ran back to

designation.

the struggling, wounded officer. Petitioner asked Officer Ilyankoff for the keys and then allegedly shot him in the back of the head at close range. Ford took the keys and made a high speed escape.

Petitioner was convicted in Circuit Court, Broward County, Florida, of first degree murder. In accordance with the jury's recommendation, the trial judge sentenced him to death. On direct appeal, both the conviction and sentence were affirmed. *Ford v. State*, 374 So.2d 496 (Fla.1979). The United States Supreme Court denied Ford's petition for writ of certiorari. *Ford v. Florida*, 445 U.S. 972, 100 S.Ct. 1666, 64 L.Ed.2d 249 (1980).

Petitioner thereafter joined with 122 other death row inmates in filing an application for extraordinary relief and petition for writ of habeas corpus in the Florida Supreme Court. The petitioners challenged the court's practice of receiving nonrecord information in connection with review of capital cases. The Florida Supreme Court dismissed the petition, *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981), and the United States Supreme Court denied certiorari, *Brown v. Wainwright*, U.S. 102 S.Ct. 542, 70 L.Ed.2d 407 (1981).

Ford then filed a motion for post-conviction relief pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure and applied for a stay of execution. Relief was denied. *Ford v. State*, 407 So.2d 907 (Fla. 1981).

Finally, petitioner filed a petition for writ of habeas corpus under 28 U.S.C.A. § 2254 in the United States District Court for the Southern District of Florida. The district court denied relief, and we granted a stay of execution so that the issues raised could be reviewed on appeal.

I.

Admission of Ford's Oral Confession

Ford was arrested in Gainesville, Florida on the day of the murder. He refused to

talk with Gainesville police officers, indicating he first wanted to consult a lawyer. He was given an opportunity to talk to a public defender, but refused to accept that representation. He was unable to reach his private attorney.

Fort Lauderdale police officers came to return Ford to Fort Lauderdale. The *Miranda* warnings were given and petitioner "wanted" to talk but would not give a written statement until he had contacted his lawyer. Petitioner's only statement at the time was "I didn't shoot that cop." On a small plane from Gainesville to Fort Lauderdale, another officer gave Ford *Miranda* warnings. Ford said he was willing to talk but would give no written statement until he had talked with his lawyer. After informing a Fort Lauderdale officer of his earlier unsuccessful effort to contact his attorney and his refusal of representation by the public defender, petitioner admitted participating in the Red Lobster robbery. Although denying participation in the killing, he admitted being left behind at the Red Lobster by his accomplices, seeing a police officer lying on the ground as he left the restaurant, and escaping in the police car which he abandoned for a green Volkswagen.

Ford claims admission of the above statement in his trial violated the Fifth, Sixth and Fourteenth Amendments and was contrary to *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), and its progeny, including *United States v. Priest*, 409 F.2d 491 (5th Cir. 1969),¹ and *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981). He argues that having invoked without waiving his right to counsel, his responses to subsequent police-initiated custodial interrogation without an attorney should not have been admitted into evidence.

Petitioner moved to suppress his confession, but failed to appeal the trial court's denial of his motion on direct appeal to the Florida Supreme Court. Based on *Wain-*

1. The Eleventh Circuit, in the en banc decision of *Banner v. City of Prechard*, 681 F.2d 1306 (11th Cir. 1981), adopted as precedent the deci-

sions of the former Fifth Circuit, decided prior to October 1, 1981.

wright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977), the district court held Ford's failure to raise the issue on direct state appeal forecloses its consideration in this habeas corpus proceeding.

[1] The Florida procedural law is clear. A criminal defendant's failure to raise an issue which could be asserted on direct appeal precludes consideration of the issue on a motion for post-conviction relief under Florida Rule of Criminal Procedure 3.850. *Hargrave v. State*, 396 So.2d 1127 (Fla. 1981). Accordingly, the state courts refused to consider this contention concerning the confession.

In *Fay v. Noia*, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963), the Supreme Court held a state prisoner who knowingly and deliberately bypasses state procedures intentionally relinquishes known rights and can be denied habeas corpus relief on that basis. Recognizing *Fay* left open the possibility of "sandbagging" by defense lawyers, the Supreme Court narrowed its sweeping rule in *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 2507, 53 L.Ed.2d 594 (1977). The Court held that absent a showing of both cause for noncompliance and actual prejudice, habeas corpus relief is barred where a state prisoner has failed to comply with a state contemporaneous objection rule. 433 U.S. at 87, 97 S.Ct. at 2506.

While *Sykes* arose in the context of a procedural default at the trial level, we have applied its rationale in cases involving a procedural default during the course of a direct appeal from a state court conviction. See *Huffman v. Wainwright*, 651 F.2d 347 (5th Cir. 1981); *Evans v. Maggio*, 557 F.2d 430, 433-34 (5th Cir. 1977). Other circuits have applied *Sykes* in the same fashion. See *Forman v. Smith*, 633 F.2d 634, 640 (2d Cir. 1980); *Cole v. Stevenson*, 620 F.2d 1055 (4th Cir. 1980); *Gibson v. Spalding*, 665 F.2d 863, 866 (9th Cir. 1981). Applying *Sykes* in this setting accrues the dual advantage of discouraging defense attorneys from omitting arguments in preparing appeals with the intent of saving issues for federal habeas corpus consideration and encouraging state appellate courts to strictly

enforce procedural rules, thereby reducing the possibility the federal court will decide the constitutional issue without the benefit of the state's views. *Gibson v. Spalding*, 665 F.2d at 866; *Wainwright v. Sykes*, 433 U.S. at 90, 97 S.Ct. at 2508. Additionally, application of *Sykes* to the forfeiture of specific claims on appeal promotes the goals of comity and accuracy identified by the *Sykes* Court. *Forman v. Smith*, 633 F.2d at 639.

[2] Thus, in this Circuit a state prisoner can forego the opportunity to raise constitutional issues in habeas corpus proceedings by deliberately bypassing state appellate procedural rules or by merely failing to follow them without showing both cause for the default and prejudice resulting from it. Because this record does not reveal Ford's procedural default was the result of an intentional bypass within the meaning of *Fay*, we turn to the cause and prejudice exception of *Sykes*.

[3] Cause and prejudice are sometimes interrelated. *Huffman v. Wainwright*, 651 F.2d at 351. While the Supreme Court has not explicitly defined cause and prejudice, our precedents have defined "cause" sufficient to excuse a procedural default in light of the determination to avoid "a miscarriage of justice." *Id.* Prejudice means "actual prejudice" which in this case must result from the failure to appeal the trial court's admission of petitioner's statement. See *Francis v. Henderson*, 425 U.S. 536, 96 S.Ct. 1708, 48 L.Ed.2d 149 (1976); *Buckelew v. United States*, 575 F.2d 515, 519 (5th Cir. 1978).

[4] A careful review of the record reveals the *Sykes* exception does not apply in this case. Ford's argument that the procedural default is excused because of the position of Florida courts at the time on the issue must fail. The claim was perceived and asserted in the trial court, and therefore could have been asserted on appeal. *Engle v. Isaac*, — U.S. —, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982).

If a defendant perceives a constitutional claim and believes it may find favor in

the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid. Allowing criminal defendants to deprive the state courts of this opportunity would contradict the principles supporting Sykes.

— U.S. at —, 102 S.Ct. at 1572 (footnotes omitted).

Even addressed in terms of manifest injustice, see *Huffman v. Wainwright*, 651 F.2d 347 (5th Cir. 1981), under the circumstances of this case, imposition of the Sykes forfeiture rule does not constitute a miscarriage of justice. Petitioner does not contest the accuracy of the statement made to the Fort Lauderdale police. The statement admitted only passive and participation in the robbery, it denied participation in the shooting. The Florida Supreme Court, in discussing effectiveness of counsel, concluded and we agree that "[t]here was abundant evidence apart from the confession, some by eyewitnesses, to place him at the scene as a participant." *Ford v. State*, 407 So.2d at 509.

II.

Failure to Require Resentencing When Evidence Insufficient on Some Aggravating Circumstances

After receiving instructions on the eight aggravating circumstances under Fla.Stat. § 921.141, Ford's jury recommended the death penalty. Finding evidentiary support for all eight aggravating circumstances, the judge sentenced petitioner to death. On appeal, the Florida Supreme Court ruled three of the eight did not apply because two lacked evidentiary support and one was based on the same aspect of the crime as another circumstance. *Ford v. State*, 374 So.2d 496, 501-03 (Fla.1979). The court upheld the five other aggravating circumstances, specifically finding the killing "especially heinous, atrocious, or cruel." *Id.* at 503. In the absence of any mitigating circumstances, death was presumed the appropriate

penalty and the sentence was affirmed. *Id.*

Petitioner argues that *Henry v. Wainwright*, 661 F.2d 56 (5th Cir. 1981), and *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir. 1981), *cert. granted*, — U.S. —, 102 S.Ct. 90, 71 L.Ed.2d 82 (1981), require resentencing under the above circumstances.

In *Stephens* the Georgia Supreme Court had held unconstitutional one of the statutory aggravating circumstances presented to the jury. We held that the death sentence must be set aside because it was impossible to tell from the record the extent to which the Georgia jury had relied on an unconstitutional statutory aggravating factor in imposing the death penalty. *Stephens v. Zant*, 631 F.2d at 406. In *Henry*, we held the trial court committed constitutional error in admitting into evidence and permitting the jury to consider evidence of nonstatutory aggravating circumstances. *Henry v. Wainwright*, 661 F.2d at 60. These two cases are inapposite to the case at bar.

[5] The instant case involves consideration of neither unconstitutional nor nonstatutory aggravating factors. That evidence was insufficient to support two circumstances and one circumstance was based on the same aspect of the crime as another does not compel the conclusion that the death sentence was unconstitutionally infected by consideration of extraneous evidence. The sentencing jury and judge considered only evidence of factors which could properly be considered by them. Where, as here, there were no statutory mitigating circumstances and the sentencer has considered only constitutional statutory aggravating circumstances, we perceive no reversible error where properly found statutory aggravating circumstances sufficiently support the sentence. The Florida Supreme Court's review has achieved the goals of rationality, consistency and fairness required under *Proffitt v. Florida*, 428 U.S. 242, 258-60, 96 S.Ct. 2960, 2969-70, 49

L.Ed.2d 913 (1976), and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972).

[6] Neither did the trial court commit constitutional error in instructing the jury as to all aggravating and mitigating circumstances permitted by the statute. To assure the jury understands the structure of the law as required by *Proffitt*, it seems appropriate that they be charged fully on the Florida statute, provided proper instructions on the burden of proof and the standard of evidence required to prove the factors are given.

III.

Instructions on Mitigating Circumstances

Instructing the jury on aggravating circumstances, the trial judge stated, "you shall consider only the following . . ." and read the statutory language. With regard to mitigating circumstances, he said, "you shall consider the following . . ." again reading the appropriate statutory language. Ford neither objected to the instruction at trial nor raised it on direct appeal.

Relying primarily on *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981), petitioner argues the above instructions improperly limited the jury's consideration to statutory mitigating factors and precluded consideration of nonstatutory mitigating factors contrary to *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). *Lockett* held "the sentencer . . . [must] not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that defendant proffers as a basis for a sentence less than death." 438 U.S. at 604, 98 S.Ct. at 2964.

With reference to aggravating circumstances, the Mississippi trial court in *Washington* instructed the jury to "consider only the following elements . . ." As to mitigating circumstances, the judge stated, "consider the following elements . . ." *Washington v. Watkins*, 655 F.2d at 1367. The state court concluded:

If you unanimously find from the testimony that one or more of the preceding elements of mitigation exist[s], then you must consider whether it outweighs the aggravating circumstances you previously found and you must return one of the following verdicts.

Id. at 1368 (emphasis added).

Reasoning that in determining whether aggravating outweighed mitigating factors jurors might have believed it was their sworn duty to consider only the two statutory mitigating circumstances enumerated in the charge, the Fifth Circuit reversed *Washington's* death sentence.

[7, 8] In evaluating the state court's instructions, we must pay careful attention to the words actually spoken to the jury to determine the interpretation a reasonable juror might give the instruction in question. *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979). The entire charge must be examined as a whole to discern whether the issues and law presented to the jury were adequate. *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th Cir. 1980), cert. denied, 452 U.S. 907, 101 S.Ct. 3035, 69 L.Ed.2d 409. Where some deficiency exists in the language of the charge taken as a whole, it must be shown that it so infected the entire trial process that a due process violation occurred. *Cupp v. Naughten*, 414 U.S. 141, 94 S.Ct. 396, 38 L.Ed.2d 368 (1973); *Washington v. Watkins*, 655 F.2d at 1369.

[9] Evaluating the jury charge in this case under the foregoing standard, we reject Ford's contention. While the instructions in *Washington* and the instant case involve similar use of the term "only," there are significant differences. Petitioner's jury was read the entire list of statutory mitigating circumstances and was not confined to two "preceding elements of mitigation," an important factor to the court's decision in *Washington*. 655 F.2d at 1370. More importantly, the sentencing judge's order which stated "[t]here are no mitigating circumstances existing—either statutory or otherwise—which outweigh any aggravating circumstances" reflects his con-

sideration of the nonstatutory mitigating evidence offered by Ford. The Florida statute does not restrict a jury's consideration of mitigating circumstances to those listed in the statute. It is reasonable to conclude the state trial judge's perception that nonstatutory mitigating factors could be considered was conveyed to the advisory jury. The language about which petitioner complains did not so "infect" the entire sentencing process as to present a due process violation.

IV

Standard by Which Aggravating Circumstances Must Outweigh Mitigating Factors

Florida Statute § 921.141(3)(b) requires the sentencing court, in imposing the death penalty, to state in writing its finding "[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances." Petitioner contends that because the statute, case law and jury instructions do not require the state to prove that aggravating factors outweigh mitigating factors "beyond a reasonable doubt," Florida's death penalty statute, on its face and as applied in this case, denies convicted capital defendants due process. Ford argues that the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances, and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment. Since the element is part of the crime, he asserts that the beyond a reasonable doubt standard is required by *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), and its progeny. We reject this argument for several reasons.

[10] First, that the aggravating must outweigh mitigating factors for imposition of the death penalty under the Florida statute is not an element of the crime of capital murder in Florida. Under the Florida bifurcated death penalty statute, the sentencing proceeding is entirely separate from trial on the capital offense. Indeed, in certain circumstances the state judge can sum-

mon different jurors for the latter phase: Fla.Stat. § 921.141(1). Guilt of the capital offense having already been decided, the sentencing jury's sole function is to render an advisory sentence aiding the state judge in determining whether the defendant should be sentenced to death or life imprisonment. *Id.* Thus, that the Due Process Clause "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged," *In re Winship*, 397 U.S. at 364, 90 S.Ct. at 1072 (emphasis added), is irrelevant to deciding under the Florida statute whether there are insufficient mitigating circumstances to outweigh aggravating circumstances. The aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed. As the Supreme Court explained:

While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of *Furman* are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976).

Second, the United States Supreme Court has declared constitutional on its face Florida's capital sentencing procedure, including its weighing of aggravating and mitigating circumstances. The Supreme Court stated:

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. at 258, 96 S.Ct. at 2969. The statute, facially constitutional, was strictly applied according to its terms.

[11] Third, Ford's argument under *In re Winship* seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), and *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597, 617 18 (1979), the relative weight is not. The process of weighing circumstances is a matter for judge and jury, and, unlike facts, is not susceptible to proof by either party. Petitioner's contrary suggestion is based on a misunderstanding of the weighing process, the statute and the guiding and channeling function identified in *Proffitt v. Florida*, 428 U.S. at 258, 96 S.Ct. at 2969. Indeed, it appears no case has applied *In re Winship* in the manner Ford urges. The North Carolina and Utah cases cited by him which imposed a reasonable doubt standard in this situation turned on construction of state statutes rather than the due process rationale of *In re Winship*. See *State v. Johnson*, 257 S.E.2d at 617, and *State v. Woods*, 648 P.2d 71 (1981) [Utah 1981].

Ford's alternate argument, raised for the first time in his reply brief, is that the Florida capital sentencing proceeding involves new findings of fact significantly affecting punishment to which the full panoply of due process rights should be extended, including the requirement that the state prove beyond a reasonable doubt that mitigating factors outweigh aggravating factors. Again, petitioner confuses proof of facts with the weighing process undertaken by the sentencing jury and judge. Because the latter process is not a fact susceptible of proof under any standard, we reject this contention.

V.

Florida Supreme Court's Standard of Review

Ford claims the Florida Supreme Court, in reviewing the evidence of aggravating

and mitigating circumstances, violated the Eighth Amendment by failing to apply in his case the same standard of review applied in other capital cases. Specifically, he contends that under Florida case law, the court should have set aside two aggravating circumstances, collapsed two aggravating circumstances into one, and found the existence of one statutory mitigating circumstance and nonstatutory mitigating circumstances.

[12] While petitioner characterizes this contention as the Florida Supreme Court's failure to apply a consistent standard of review, the district court correctly discerned that he is simply "quarreling" with the state court. Where in a capital punishment case the state courts have acted through a properly drawn statute with appropriate standards to guide discretion, *Proffitt v. Florida*, 428 U.S. at 258-59, 96 S.Ct. at 2969, federal courts will not undertake a case-by-case comparison of the facts in a given case with the decisions of the state supreme court. *Spunkellink v. Wainwright*, 578 F.2d 582, 604 05 (5th Cir. 1978). This rule stands even though were we to retry the aggravating and mitigating circumstances in these cases, "we may at times reach results different from those reached in the Florida state courts." *Id.* at 605.

[13] The Supreme Court of Florida is the ultimate authority on Florida law and we do not sit to question its interpretation of that State's statutes. See *Stephens v. Zant*, 631 F.2d at 405 06. Ford has not cited and we have not found any habeas corpus decision in which this Court has reversed a death sentence due to the state court's incorrect decision as to the existence or absence of aggravating and mitigating circumstances.

Moreover, examination of the relevant Florida Supreme Court decisions reveals that its review of petitioner's death sentence was not arbitrary, capricious or in discord with the constitutional principles relating to sentencing in capital cases. Under 28 U.S.C.A. § 2254(d), we presume cor-

rect facts properly found by the state courts. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), *after remand*, — U.S. —, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). There is nothing in this record to show the Florida Supreme Court failed to apply the standard of review mandated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972), and its progeny.

VI.

Assistance of Counsel at Sentencing

Petitioner contends he received ineffective assistance of counsel at sentencing. Specifically he claims that although counsel called character witnesses and a psychiatrist to testify in mitigation, he "failed to focus the trial judge's and jury's attention on the critical factors relevant to the sentence determination." Careful review of the record and Ford's specific arguments reveals this contention is nothing more than an attack on the reasoned tactics and strategy of experienced trial counsel.

[14, 15] On reviewing ineffective assistance of counsel claims, we do not sit to second guess considered professional judgments with the benefit of 20/20 hindsight. *Washington v. Watkins*, 655 F.2d at 1355; *Easter v. Estelle*, 609 F.2d 756 (5th Cir. 1980). We have consistently held that counsel will not be regarded constitutionally deficient merely because of tactical decisions. See *United States v. Guerra*, 628 F.2d 410 (5th Cir. 1980), *cert. denied*, 450 U.S. 934, 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981); *Bucklew v. United States*, 575 F.2d 515 (5th Cir. 1978); *United States v. Beasley*, 479 F.2d 1124, 1129 (5th Cir.), *cert. denied*, 414 U.S. 924, 94 S.Ct. 252, 38 L.Ed.2d 158 (1973); *Williams v. Beto*, 354 F.2d 688 (5th Cir. 1965). That an attorney's strategy may appear wrong in retrospect does not automatically mandate constitutionally ineffective representation. *Baty v. Balkeem*, 661 F.2d 391, 395 n.8 (5th Cir. 1981); *Baldwin v. Blackburn*, 653 F.2d 942, 946 (5th Cir. 1981).

[16] That counsel for a criminal defendant has not pursued every conceivable line of inquiry in a case does not constitute ineffective assistance of counsel. *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980). This is not a case in which counsel allegedly failed to adequately prepare and investigate. See *Washington v. Strickland*, 673 F.2d 879 (5th Cir. 1982). Ford's counsel was reasonably likely to render and did render reasonably effective assistance. *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974). Because the record reveals counsel's representation was constitutionally adequate and there resulted no prejudice to petitioner by any action or inaction of counsel, see *Washington v. Watkins*, 655 F.2d at 1362, Ford has not carried his burden of proving ineffective assistance of counsel. *United States v. Killian*, 639 F.2d 206, 210 (5th Cir. 1981).

VII.

The Brown Issue: Nonrecord Material Before the Florida Supreme Court

Petitioner alleges the Florida Supreme Court had a practice of receiving nonrecord materials concerning death row inmates during the pendency of the appeal of his death sentence. Ford specifically claims that in his case the Florida Supreme Court reviewed *ex parte* psychiatric evaluations or contact notes, psychological screening reports, post-sentence investigation reports and state prison classification and admission summaries. This practice, he contends, precluded adversarial testing of the information in violation of his rights to due process of law, effective assistance of counsel, confrontation and reliability and proportionality of capital sentencing. Additionally, he argues the court's receipt of results of psychiatric examinations which were conducted without first informing him of his Fifth Amendment rights violated his privilege against self-incrimination and his right to confer with his attorney before determining whether to submit to them.

This issue first surfaced in a petition for writ of habeas corpus directed to the Florida Supreme Court brought on behalf of 122

Florida death row inmates, of which Ford was one. The Court denied the petition with a full opinion. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.), cert. denied, — U.S. —, 102 S.Ct. 542, 71 L.Ed.2d 407 (1981).

We reject the contention both generally and specifically as made for Ford. The function of the Supreme Court of Florida in these cases is to review sentences for procedural regularity and proportionality. The court does not "impose" sentence, and for that reason there cannot exist a due process violation under *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1980). As the Florida Supreme Court aptly stated:

The record of each proceeding, and precedent, necessarily frame our determinations in sentence review. Our opinions, of course, then expound our analysis. Factors or information outside the record play no part in our sentence review role. Indeed, our role is neither more nor less, but precisely the same as that employed by the United States Supreme Court in its review of capital punishment cases. Illustrative of the Court's exercise of the review function is *Golfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980).

It is evident, once our dual roles in the capital punishment scheme are fully appreciated, that non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence "review." That fact is obviously appreciated by the United States Supreme Court, for it very carefully differentiated the sentence "review" process of appellate courts from the sentence "imposition" function of trial judges in *Proffitt* and *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976).

Brown v. Wainwright, 392 So.2d at 1332-33. We view the court's statement in *Brown* that such material would be irrelevant to its ultimate decision in these cases correct as a description of its function and as a statement of law. Of course, review of the records in other cases is necessarily involved

in achieving the United States Supreme Court's requirement of consistency and proportionality.

[17] Specifically we reject the claim for three reasons. First, there is not an iota of evidence in this record to indicate the Florida Supreme Court viewed any extra-record materials in affirming petitioner's conviction and sentence. The court's reviewing such information in connection with death row inmates other than Ford would not render his death sentence unconstitutional. Thus, discovery on this issue, based solely on Ford's bare, unsupported allegations, would be nothing more than a fishing expedition in which it would be necessary for him to show that in his case the court received, viewed and relied on the information. Since the latter could not be shown in the face of *Brown v. Wainwright*, we affirm the district court's refusal to permit Ford to launch such a discovery expedition.

Second, there is absolutely no indication what material could have been received by the court which was prejudicial. By the specific description of the information set forth in his habeas corpus petition, Ford presumably knows something of the nature of the materials allegedly viewed. He made no effort whatsoever to demonstrate these materials were harmful to his case.

[18, 19] Third, in the face of petitioner's unsupported allegations to the contrary, we accord a presumption of correctness to the Florida Supreme Court's statement that its members properly perform their procedural appellate function in reviewing death sentences. See 28 U.S.C.A. § 2254(d); *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), after remand, — U.S. —, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982). In the context of a federal collateral attack on a state criminal conviction, comity and federalism demand no less. As the highest court in the state, the Florida Supreme Court's interpretation of its procedural role is the law of the state and we do not question it. See *Stephens v. Zant*, 631 F.2d at 405-06.

These conclusions do not reflect the view that any court, including an appellate court, should review material extraneous to the record. We do not condone such a practice.

Conclusion

The Court has discussed above the seven issues as framed by petitioner in his brief. Although not required to do so, because of the now usual practice of challenging counsel's effectiveness in later proceedings, we have examined every issue asserted in the petition for writ of habeas corpus. These issues were set forth by headings in the pleadings as follows:

Grounds for Habeas Corpus Relief

- A. Denial of Right to Confront Witnesses
- B. Non-disclosure of Exculpatory Evidence
- C. Denial of Right to Assistance of Counsel
- D. Witherspoon Violation of Petitioner's Right to Trial by Fair and Impartial Jury
- E. Sentencing Phase Instructions to the Jury: Permitting the Arbitrary, Unguided Imposition of the Death Penalty
- F. Unconstitutional Shifting of the Burden of Proof at the Penalty Phase
- G. Review by the Florida Supreme Court: Failure to Set Aside Death Sentence Despite the Substantial Erosion of the Basis for the Death Sentence
- H. Review by the Florida Supreme Court: Failure to Assure the Imposition of the Death Penalty Fairly and Consistently
- I. The Violation of Mr. Ford's Constitutional Rights by the Practice of the Supreme Court of Florida Reviewing, in Connection with Appeal, Unknown to Mr. Ford or His Counsel, Certain Documents Pertaining to Mr. Ford

J. Ineffective Assistance of Counsel: Guilt Phase

K. Ineffective Assistance of Counsel: Penalty Phase

L. Ineffective Assistance of Counsel: Appeal

Many of these grounds were asserted under different nomenclature on this appeal. The ones not raised for review by this Court were wisely abandoned. A review of the entire petition and the district court's decision reveals no grounds upon which relief should be granted in this case. The district court's decision is affirmed on every point considered by it.

AFFIRMED.

KRAVITCH, Circuit Judge, concurring in part and dissenting in part:

Although I concur in Parts I, IV, V, and VI of the majority's opinion, I write separately because I disagree with the majority's resolution of the sentencing issues in Parts II, III, and VII. In my view, Supreme Court and former Fifth Circuit precedent compels a reversal on both the aggravating and mitigating circumstances claims and on the claim that the state court considered extra-record information in reviewing the sentence. Hence I would remand to the Florida courts for resentencing.

Effect of Florida Supreme Court's Overruling of Aggravating Circumstances Found by Trial Court

Petitioner argues that the appellate court erred in affirming his sentence despite its holding invalid three of the aggravating circumstances on which the trial judge had relied in imposing the sentence. As the majority has noted, petitioner relies on *Stephens v. Zant*, 631 F.2d 397 (5th Cir. 1980), *reh. denied and modified*, 648 F.2d 446 (5th Cir. 1981), *cert. granted*, — U.S. —, 102 S.Ct. 90, 70 L.Ed.2d 82 (1981),¹ and *Henry v.*

1. *Stephens* was orally argued before the Supreme Court on February 24, 1982, 90 U.S.L.W. 3894, and the Court's decision is still pending.

Since in my opinion this case cannot adequately be distinguished from *Stephens*, the Supreme Court's decision in *Stephens* could affect the

Wainwright, 661 F.2d 397 (5th Cir. 1981). In rejecting petitioner's argument, the majority attempts to distinguish this case from *Stephens* and *Henry* on the ground that those cases involved jury consideration of unconstitutional factors while here the initial sentencing error was not of constitutional dimension. Majority Opinion, *supra*, at 439. The reasoning of those cases does not support this distinction, however.

As the majority points out, the trial courts' errors with respect to aggravating factors in *Henry* and *Stephens* were constitutional ones.² The Fifth Circuit's decision in those cases to remand for resentencing was not predicated on the nature of the trial courts' errors, however. Rather, the court in *Stephens* and *Henry* was concerned with the procedural regularity in capital sentencing that *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) held is mandated by the eighth amendment. *Furman* required that juries' discretion in capital sentencing be guided by objective and rationally reviewable standards. The Fifth Circuit's resolution of the *Henry* and *Stephens* cases was based directly on *Furman*. In addition to the unconsti-

tutional factors considered by the sentencers in these cases, several valid aggravating circumstances had been found. In both cases, the state supreme courts had affirmed the defendants' sentences on the basis of the valid factor alone. See *Henry v. Wainwright*, 661 F.2d at 57 n.2, 58-59; *Stephens v. Zant*, 631 F.2d 406. The Fifth Circuit disagreed and held that the defendants were entitled to new sentencing proceedings for two reasons. First, by allowing the jury to consider constitutionally invalid factors, the trial judges had failed to channel the juries' discretion to ensure nonarbitrary sentencing.³ Second, even though the juries could rationally have recommended the death sentence on the basis of the permissible factors they had considered, there was no way for the court retrospectively to determine whether they would in fact have done so had they been properly instructed. An attempt to second-guess the jury, in the court's view, was not the proper role of the reviewing court but was "the antithesis of the rational review of the jury's application of clear and objective standards contemplated by *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) and its progeny."⁴

outcome of this case. For this reason, I would defer decision of the *Stephens* issue until the Supreme Court has decided it.

2. In *Stephens*, the judge had permitted the jury to consider four of the statutory aggravating circumstances. The jury found that three of the four were present and recommended death. On review, the Georgia Supreme Court noted that one of the circumstances relied on by the jury had subsequently been held unconstitutional; it nonetheless affirmed *Stephens*' sentence because it found the evidence supported the other three aggravating factors found by the jury. See *Stephens v. Zant*, 631 F.2d at 405-06.

In *Henry*, the court faced a similar situation. At the defendant's sentencing hearing the prosecutor had presented evidence of an aggravating factor not within those listed in the sentencing statute, and the judge instructed the jury that they were not limited to consideration of the statutory aggravating factors. The jury recommended the death penalty, which the judge then imposed. The Florida Supreme Court upheld the sentence even though it recognized that the judge had erred in allowing the jury to consider the nonstatutory factor,

concluding that "death sentences partially predicated on nonstatutory aggravating factors do not violate constitutional prohibitions." *Henry v. Wainwright*, 661 F.2d at 59 (citing *Elledge v. State*, 346 So.2d 998, 1002-02 (Fla. 1977)).

3. *Stephens v. Zant*, 631 F.2d at 406 (as modified by 648 F.2d 446); *Henry v. Wainwright*, 661 F.2d at 60.

4. *Henry v. Wainwright*, 661 F.2d at 60 n.8 (citing *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 2990, 49 L.Ed.2d 944 (1976)). The *Henry* panel rejected the reasoning of the Florida court that the sentence would be affirmed as long as no mitigating circumstances were found because "there is no danger that the unauthorized [aggravating] factor tipped the scale in favor of death." *Henry v. Wainwright*, 661 F.2d at 59. *Henry* held that the reviewing court's role in capital sentencing was not to second-guess the motives of the jury in recommending the death penalty.

Guarding against the arbitrary and discriminatory imposition of the death penalty must not become simply a guessing game played by a reviewing court in which it tries to

The Fifth Circuit's decision to remand for resentencing in *Henry* and *Stephens* does not depend on the status of the sentencer's error as constitutional or statutory but rather concerns the procedure for rectifying that error. The capital sentencing statutes under consideration in those cases had been designed by the state legislatures to meet *Furman*. As those cases recognized, where a judge or jury disregards or misinterprets the procedures or criteria established by the state's sentencing scheme, the regularity and objectivity in sentencing that the statute is designed to accomplish is defeated. Once such an error has been made, however, there are different possible approaches to correcting it. *Henry* and *Stephens* recognized that not all such approaches satisfy *Furman*'s rational appellate review requirement. They thus rejected the state courts' method. Superimposing on defective sentencing a review procedure under which the appellate court, having identified the sentencer's error, then speculates as to what the sentencer would have done had the error not been made compounds rather than resolves the problem and is clearly inconsistent with *Furman*. The Supreme Court has also recognized the infirmity of such a review process. *Presnell v. Georgia*, 439 U.S. 14, 99 S.Ct.

235, 58 L.Ed.2d 207 (1978) (per curiam) (imposition of death sentence violated due process where state supreme court rejected jury's grounds for sentence but affirmed sentence on ground that evidence supported theory not relied on by jury). Cf. *Eddings v. Oklahoma*, — U.S. —, —, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (O'Connor, J., concurring) (where it appears trial judge believed he could not consider mitigating evidence, Court will not speculate as to whether he did consider it but found it insufficient; "Woolson [v. North Carolina, 428 U.S. 280 (96 S.Ct. 2978, 49 L.Ed.2d 944) (1976)] and *Lockett v. Ohio*, 438 U.S. 586 (98 S.Ct. 2954, 57 L.Ed.2d 973) (1978)] require us to remove any legitimate basis for finding ambiguity concerning the factors actually considered by the court").

The posture of this case is identical to, and therefore poses the same problem raised by, *Henry* and *Stephens*. The trial judge found that eight statutory aggravating factors and no mitigating factors existed and therefore sentenced petitioner to death.⁵ On appeal, the Florida Supreme Court held that the trial judge had erred with respect to several of the aggravating circumstances⁶ but upheld petitioner's sentence because "even though there was some error in assessment of some of the statutory

discern whether the nonstatutory aggravating factors exerted a decisive influence on the sentence determination. The guarantee against cruel and unusual punishment demands more.

Id. at 60.

Similarly, in *Stephens* the court held the sentence unconstitutional because it was "impossible for a reviewing court to determine satisfactorily that the verdict in this case was not decisively affected by an unconstitutional statutory aggravating circumstance." *Stephens v. Zant*, 631 F.2d at 406. The constitutional deficiency in the sentence was not only that "the jury's discretion here was not sufficiently channelled," but also "that the process in which the death penalty was imposed in this case was not 'rationally reviewable.'" *Id.* at 406. See also *id.* (as modified by 648 F.2d 446).

5. See Trial Court Findings on Sentencing, reprinted in *Ford v. State*, 374 So.2d 496, 500-02 n.1 (Fla.1979). Under Florida's capital sentencing statute, Fla.Stat. § 921.141, a defendant convicted of a crime punishable by death receives a separate sentencing hearing before the

judge and jury that convicted him. At that proceeding, the parties may present evidence of aggravating and mitigating circumstances, and the jury is instructed to weigh those factors and render an advisory sentence. If it concludes that the aggravating factors outweigh the mitigating ones it must recommend the death penalty; otherwise it is required to recommend life imprisonment. *Id.* § 921.141(2). The judge, with the jury's recommendation in mind, then makes the same determination and decides which sentence to impose. *Id.* § 921.141(3). If the judge imposes a sentence of death, he is required to set forth findings of fact with respect to aggravating and mitigating circumstances. *Id.*

6. Specifically, it held that the evidence did not support the trial court's findings of two of the factors and that the evidence used by the judge to support two other factors should have been viewed as establishing only one aggravating circumstance. *Ford v. State*, 374 So.2d at 501-03.

aggravating factors, there being no mitigating factors present death is presumed to be the appropriate penalty." *Ford v. State*, 374 So.2d at 503. By attempting to distinguish this case from *Henry and Stephens* the majority confuses the requirement of *Furman* that capital sentencing be structured by procedures and criteria that are rationally reviewable with the requirements of other cases imposing substantive constitutional limitations on such criteria.⁷ I do not suggest that every question of statutory interpretation involving capital sentencing criteria necessarily implicates the Federal Constitution. On the contrary, it is the

procedure here employed by the state court, and not its substantive decision, that in my view raises a constitutional issue. I would hold only that the rational review requirement of *Furman* compels resentencing in instances, such as this one, in which the sentencer has misapplied the state's capital sentencing criteria.

Instructions on Mitigating Circumstances

The instructions given to the jury in this case were identical in most critical respects to those held invalid in *Washington v. Watkins*, 655 F.2d 1346 (5th Cir. 1981).⁸ The

7. E.g., *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980) (aggravating criterion that offense was "outrageously or wantonly vile, horrible, or inhuman" unconstitutional as applied to crime reflecting no more "depravity" of mind than that of anyone guilty of murder); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (mitigating criteria to be considered in capital sentencing must include evidence proffered by defendant concerning his character, record, and offense). See also *Coker v. Georgia*, 433 U.S. 584, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (aggravating circumstances will not justify death sentence where such penalty is disproportionate to offense); *Gregg v. Georgia*, 428 U.S. 153, 173, 96 S.Ct. 2909, 2925, 49 L.Ed.2d 859 (1976) (death sentence must accord with "evolving standards of decency" as reflected in "contemporary values" and with fundamental "dignity of man").

8. The instructions invalidated in *Washington* were as follows:

Members of the jury, as the court explained to you in the beginning of the trial, you have heard some evidence in aggravation put on by the State and you have heard evidence in mitigation put on by the defendant. You must in your sentencing find at least one item present of aggravation before you could impose the death penalty. If you find an item in aggravation present beyond a reasonable doubt, then you must consider any evidence in mitigation. And unless the evidence in mitigation could overcome the aggravation, of course, then you could return the death penalty.

You have found the defendant guilty of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision you must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself. To return the death penalty you must find that the aggravating circumstances, those which tend to warrant the

death penalty, outweigh the mitigating circumstances, which are those which tend to warrant the lesser [sic] severe penalty. Now consider only the following elements of aggravation in determining whether the death penalty should be imposed. One, the capital murder was committed while the defendant Johnny Lewis Washington was engaged in the commission of the crime of robbery. Two, the defendant Johnny Lewis Washington committed this capital murder in an especially heinous, atrocious, or cruel manner. Those are your elements of aggravation.

You must unanimously find beyond a reasonable doubt that one or more of these existed in order to return the death penalty. Now if one or more of those elements of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances. Now consider the following elements of mitigation in determining whether the death penalty should not be imposed: One, that the defendant has no significant history of prior criminal activity and two, the defendant's age at the time of the capital murder.

If you unanimously find from the testimony that one or more of the preceding elements of mitigation exist[s], then you must consider whether it outweighs the aggravating circumstances you previously found and you must return one of the following verdicts: *Washington v. Watkins*, 655 F.2d at 1367-68. The jury instructions given by the trial judge at petitioner's trial provided:

Ladies and gentlemen, you have heard the evidence and argument of counsel necessary to enable you to render an advisory sentence to the Court as to whether the defendant should be sentenced to death or to life imprisonment.

* * * * *

Your advisory sentence will have three parts. First, Whether sufficient aggravating circumstances exist to justify a sentence of death.

majority attempts to distinguish *Washington* on the basis of (1) the concluding reference by the trial judge in *Washington* to "the preceding elements of mitigation" and (2) the fact that the charge here listed all the statutory elements of mitigation whereas in *Washington* the judge listed only two of the statutory factors. The majority's reliance on the "preceding elements" language is misplaced. While it is true that the *Washington* court found that language "further supported" the inference that the enumerated factors were the sole factors to be considered by the jury, *id.* at 1370, the court concluded that "a reasonable juror might well infer" the listed factors were exclusive from the judge's use of the term "only" with respect to aggravating factors and from the immediately following "almost exactly parallel[]" language pertaining to mitigating circumstances. These

two features of the judge's instruction alone would have supported such inference. See *id.* The "preceding elements" language present in *Washington* was supportive, but clearly not the decisive factor in the court's decision. *Id.* The majority's second purported distinction—the enumeration of all the statutory mitigating factors here in comparison with two listed in *Washington*—is a distinction without a difference. The issue we are here concerned with is whether the jury reasonably may have believed it was limited to considering mitigating evidence that fit within the statutorily enumerated factors. Whether the instructions set forth two, five, or a dozen statutory factors has no bearing on the jury's understanding of the defendant's right under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2964, 57 L.Ed.2d 973 (1978) to have it consider nonstatutory factors as well. At petition-

Second: Whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death.

Third: Based on those considerations whether the defendant should be sentenced to life imprisonment or to death.

* * * * *

As to aggravating circumstances, in considering whether sufficient aggravating circumstances exist to justify a sentence of death, you shall consider only the following:

A. whether the defendant was under sentence of imprisonment when the defendant committed the murder of which he has just been convicted by you;

B. whether the defendant has previously been convicted of another capital felony or of a felony involving the use of or threat of violence to the person;

C. whether in committing the murder of which the defendant has just been convicted by you, the defendant knowingly created a great risk of death to many persons;

D. whether the murder of which you have convicted the defendant was committed while the defendant was engaged in the commission of or attempt to commit, or flight after committing, or attempting to commit any robbery, rape, arson, burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing or discharging of a destructive device or bomb;

E. whether the murder of which the defendant has just been convicted by you was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

F. whether the murder of which the defendant has just been convicted by you was committed for pecuniary gain.

G. whether the murder of which the defendant has just been convicted by you was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws.

H. whether the murder of which the defendant has just been convicted by you was especially heinous, atrocious, or cruel.

As to mitigating circumstances, in considering whether sufficient mitigating circumstances exist which outweigh any aggravating circumstances to justify a sentence of life imprisonment rather than a sentence of death, you shall consider the following:

A. whether the defendant has no significant history of prior criminal activity;

B. whether the murder was committed while the defendant was under the influence of extreme mental or emotional disturbance;

C. whether the victim was a participant in the defendant's conduct or consented to the act;

D. whether the defendant was an accomplice in the murder committed by another person and the defendant's participation was relatively minor;

E. whether the defendant acted under extreme duress or under the substantial domination of another person;

F. whether the capacity of the defendant to appreciate the criminality of his conduct or to conform the defendant's conduct to the requirements of the law was substantially impaired;

G. the age of the defendant at the time of the crime.

er's sentencing hearing, as in Washington's and Lockett's, his attorney presented evidence concerning his character and background. "[N]owhere in the trial court's charge to the jury in the sentencing phase of [petitioner's] trial is there any explicit instruction that the jury was free to consider mitigating factors other than [those enumerated in the statute]," however. *Id.* at 1365. In Washington, the court found that no language in the charge rectified the absence of such an instruction by indicating to a reasonable jury that it was not limited to the statutory factors. The court reached this conclusion despite the trial judge's prefatory instruction that in reaching its decision the jury "must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself." *Id.* at 1369-70. Here there was lacking even the vague reference to the defendant's character and circumstances that was present in the Washington case. See note 8 *supra*. Thus, the instructions given in petitioner's sentencing hearing were even less likely to effectuate petitioner's right to have the jury consider evidence of his character and background than the instructions invalidated in Washington.⁹

Finally, the majority ascribes great significance to the sentencing judge's finding that "[t]here are no mitigating circumstan-

ces existing—either statutory or otherwise—which outweighs [sic] any aggravating circumstances." Majority Opinion, *supra* at 440. See Trial Court Findings on Sentencing, reprinted in *Ford v. State*, 374 So.2d 496, 500-02 n.1 (Fla.1979). From this four-word phrase buried in the middle of the trial judge's detailed findings concerning the statutory mitigating and aggravating factors, the majority discerns not only an understanding on the part of the judge that nonstatutory mitigating evidence was relevant; the majority additionally "conclude[s]" from these words that the "judge's perception that nonstatutory factors could be considered was conveyed to the advisory jury." Majority Opinion, *supra* at 441 (emphasis added). With all due respect, I am unable to follow the majority's reasoning. It has always been my understanding that jury instructions, not trial court findings, serve the function of informing the jury of the law. For the reasons stated above, I do not believe the instructions in this case adequately informed the jury of its duty to consider nonstatutory mitigating evidence.

Florida Supreme Court's Consideration of Extra-Record Materials

As the majority notes, petitioner claims the Florida Supreme Court reviewed vari-

foreman submitted a request to the judge, which stated: "Judge Lee, we would like the list of charges regarding the definitions of aggravating circumstances and mitigating circumstances. Signed L. Pati, foreman." The defense attorney objected to the judge's restructuring the jury on this point, but stated that if the court was to do so he would prefer the instruction be given orally rather than in writing. The judge informed the foreman that he would not provide them with a written charge but would again read it to them if they wished. The foreman then said to the other jurors: "You want to hear them again, what they consider the aggravating circumstances, what they consider the mitigating circumstances. They can't give us the things to take in. He will read them again for us, okay?" The judge then repeated the instruction previously given concerning aggravating and mitigating factors. See note 9 *supra*. The foreman's request for reconstruction concerning "what [the court] consider[s] the mitigating circumstances" indicates that he understood the circumstances enumerated by the court to be exclusive.

9. Washington compels us to remand for resentencing if the trial court's instructions, taken in their entirety, could have led a reasonable juror to believe he could consider only the statutory mitigating circumstances. Our inquiry is thus an objective one that focuses on the judge's instructions, and petitioner is not required to prove actual subjective misunderstanding of the law by the jurors. Although petitioner need not establish the actual state of mind of the jurors, evidence of their subjective understanding if available may support a conclusion that the instructions could reasonably have engendered their misunderstanding of the law. In this case, there is evidence in addition to the judge's instructions suggesting that the jurors actually considered themselves limited to the statutory mitigating circumstances. At the sentencing hearing, the judge read to the jury the charge concerning aggravating and mitigating circumstances. See note 8 *supra*. He did not give the jury a copy of that portion of the charge, however, because petitioner's attorney requested that he not do so. Shortly after the jury began its sentencing deliberations, the

ous reports, evaluations, and other materials relevant to his character that he was unaware were being used and was afforded neither access to nor an opportunity to rebut.¹⁰ Petitioner, with 122 other capital defendants in Florida, raised this claim initially in a habeas action in the Florida Supreme Court. *Brown v. Wainwright*, 392 So.2d 1327 (Fla.1981), cert. denied, — U.S. —, 102 S.Ct. 542, 70 L.Ed.2d 407 (1981). In deciding that claim,¹¹ the Florida court accepted, *arguendo*, the "petitioners' most serious charges," *id.* at 1331, and held that as a matter of law petitioners were not entitled to relief. *id.* at 1331-33. The court thus received no evidence nor made any factual findings in reaching its decision. The reasoning given by the Florida court for its resolution of this issue was twofold. First, it declared that extra-record materials are "irrelevant" to, and "play no part in," its review of capital sentences. *Id.* at 1331, 1332. Second, it held that the rule in *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), on which petitioners relied was inapplicable to situations where extra-record information was considered only at the review stage and not during the initial sentencing proceeding. *Id.* at 1331-33.

The majority adopts wholesale the reasoning of the Florida court, holding that the appellate review function is distinguishable

from sentence "imposition" and that the former is not subject to any of the procedural safeguards that govern the latter. Majority Opinion, *supra* at 443-444. The majority accepts the state court's description of its function and its assertion that it "properly perform[s]" that function as factual findings that must be presumed correct. Majority Opinion, *supra* at 444 (citing *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981)). As an additional basis for denying petitioner's claim, the majority states that petitioner has presented no evidence that the practice he complains of was utilized in his own case, or that any extra-record material that possibly was reviewed was prejudicial. I am unpersuaded by the majority's discussion and find disturbing its treatment of this important issue.

The sentencing stage of a criminal trial can be as critical, with respect to its impact on the accused, as the determination of guilt. The significance of the sentencing process and its effect on the defendant are greatest in cases involving the death penalty, which "differs from all other forms of criminal punishment, not in degree but in kind." *Furman v. Georgia*, 408 U.S. 238, 306, 92 S.Ct. 2726, 2760, 33 L.Ed.2d 346 (1972) (Stewart, J., concurring).¹² See also *Witherspoon v. Illinois*, 391 U.S. 510, 522

10. Petitioner claims that at the time of his appeal to the Florida Supreme Court that court was engaged in the regular practice of soliciting, receiving, and reviewing extra-record materials of this type—without notifying the parties involved—in connection with its review of sentencing in capital cases. Petitioner further alleges that much of this material, along with the court's letters requesting it in particular cases, was purged from the court's files rendering verification that the practice was engaged in in particular cases very difficult.

11. While refusing to allow joinder of the 123 petitions because "the facts relevant to each vary significantly," the court adjudicated Brown's petition, which adjudication in its view, "effectively dispose[d] of all claims for relief of those petitioners who have joined with Brown." *Id.* at 1330. Although the court claimed to be adjudicating Brown's petition only, its opinion repeatedly refers to "petitioners'" claims and contentions, *id.* at 1330, 1331, 1332 & 1333, and concludes by denying "[t]he

petitions of Brown and the others for writs of habeas corpus and for other extraordinary relief." *Id.* at 1333 (emphasis added).

12. Five members of the Supreme Court have "expressly recognized that death is a different kind of punishment from any other which may be imposed in this country." *Gardner v. Florida*, 430 U.S. 349, 357, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (1977) (citing various concurring and dissenting opinions in *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976) and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972)).

Lockert followed a group of cases, decided in 1976, in which the Supreme Court addressed the constitutionality of states' post-Furman death penalty statutes. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2956, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428

n 20, 88 S.Ct. 1770, 1776 n.20, 20 L.Ed.2d 776 (1968). Hence *Furman* held that imposition of the death penalty violates the eighth amendment where the process by which it is imposed is standardless and arbitrary. Subsequent cases reaffirmed this principle holding that individualized sentencing, guided by standards and procedures that constrain the sentencer's discretion, is constitutionally mandated in capital cases. *Lockett v. Ohio*, 438 U.S. 586, 600-01, 605, 98 S.Ct. 2954, 2962-2963, 2965, 57 L.Ed.2d 973 (1978).¹³

U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976). *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976). The plurality opinions in those cases emphasized that capital sentencing procedures should not create "a substantial risk that the death penalty [will] be inflicted in an arbitrary and capricious manner." *Gregg v. Georgia*, 428 U.S. at 188, 96 S.Ct. at 2932. *Jurek v. Texas*, 428 U.S. at 274, 276, 96 S.Ct. at 2957. *Proffitt v. Florida*, 428 U.S. at 252-53, 258, 96 S.Ct. at 2966-2967, 2969, and required that sentencer discretion in capital cases be "directed and limited" to provide consistent and rational imposition of the death penalty. *Gregg v. Georgia*, 428 U.S. at 189, 96 S.Ct. at 2932. *Proffitt v. Florida*, 428 U.S. at 255-58, 96 S.Ct. at 2968-2969. *Jurek v. Texas*, 428 U.S. at 279-74, 276, 96 S.Ct. at 2955-2957, 2958, and ensure "reliability in the determination that death is the appropriate punishment in a specific case." *Woodson v. North Carolina*, 428 U.S. at 305, 96 S.Ct. at 2961.

13. *Lockett* held unconstitutional a capital sentencing statute that limited the sentencer's consideration of mitigating factors concerning the defendant's character, record, and offense. Under *Lockett*, individualized sentencing with consideration given to all relevant evidence proffered by the defendant concerning his character, record, and offense is essential in capital cases.

14. In *Gardner*, the trial judge had ordered a presentence investigation after the jury had returned an advisory verdict recommending a life sentence. The judge had then disclosed part, but not all, of the presentence investigation report to the defendant's counsel and, apparently on the basis of the report, had rejected the jury's advisory verdict and sentenced defendant to death. *Gardner v. Florida*, 430 U.S. at 352-53, 97 S.Ct. at 1201-1202. The *Gardner* plurality refused to approve this procedure on the basis of *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949), which had held that due process guarantees neither a hearing nor participation by the defendant in capital sentencing. Instead the Court reaffirmed "its obligation to re-examine capital sentencing procedures against evolving standards of procedural fairness in a civilized society."

In *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the Supreme Court specifically addressed whether a death sentence imposed on the basis of material not disclosed to the defendant violated the Constitution.¹⁴ The Court held that procedure unconstitutional under the eighth amendment and the due process clause.¹⁵ The plurality first noted two constitutional developments requiring close scrutiny of capital sentencing procedures: (1) the Court's recognition of the "qualita-

ties of the death penalty," and (2) the Court's recognition of the "qualitative differences between capital and non-capital offenses." *Gardner v. Florida*, 430 U.S. at 357, 97 S.Ct. at 1204. The Court recognized that substantial constitutional developments had occurred during the 30 years since the *Williams* case was decided and determined that those developments justified a departure from *Williams*. *Id.* at 357-62, 97 S.Ct. at 1204-1206.

15. The plurality opinion in *Gardner* expressly held that the sentencing procedure at issue violated the due process clause of the fourteenth amendment. *Gardner v. Florida*, 430 U.S. at 351-358, 97 S.Ct. at 1201, 1204. The opinion's emphasis on the difference in kind between the death penalty and other punishments *id.* at 357-58, 97 S.Ct. at 1204, rejection of some arguments that it conceded might have merit in non-capital cases, *id.* at 460, 97 S.Ct. at 1205, and heavy reliance on *Furman* and other death penalty decisions, *id.* at 360-61, 97 S.Ct. at 1205-1206, however, indicate that the plurality's reasoning involved a cross-section of eighth amendment and due process concerns. Justice White's concurring opinion expressed the view that the procedure at issue clearly violated the eighth amendment and thus there was no need to address the due process issue. *Id.* at 362-64, 97 S.Ct. at 1206-1207 (White, J., concurring). Justice Blackmun concurred in the judgment on the basis of *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976) and *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976)—decisions based on the eighth amendment. *Gardner v. Florida*, 430 U.S. at 364, 97 S.Ct. at 1207 (Blackmun, J., concurring). Justice Brennan agreed with the plurality that the procedure at issue violated the due process clause but adhered to his prior opinions stating that the death penalty violates the eighth amendment in all circumstances. *Id.* at 364-65, 97 S.Ct. at 1207-1208 (Brennan, J.).

tive difference"¹⁶ between the death penalty and other punishments and the corresponding need to ensure that capital sentencing is "based on reason rather than caprice or emotion," *id.* at 357-58, 97 S.Ct. at 1204, and (2) the decisions holding that "the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause," *id.* at 358, 97 S.Ct. at 1204. With these developments in mind, the plurality considered and rejected the state's asserted justifications for allowing imposition of the death penalty on the basis of confidential information, because the risk that confidential information "may be erroneous, or may be misinterpreted, by the investigator or by the sentencing judge, is manifest" and "the interest in reliability [in capital sentencing] plainly outweighs the State's interest in preserving the availability

of [such] information." *Id.* at 359, 97 S.Ct. at 1205.¹⁷ The plurality found the argument that trial judges should be trusted to exercise their discretion responsibly in relying on confidential information was based "on the erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts" and, in any event, was clearly foreclosed by *Furman*. *Id.* at 360, 97 S.Ct. at 1205.

The majority, following the reasoning of the Florida Supreme Court, attempts to distinguish this case from *Gardner* on the ground that the confidential information in this case was considered at the appellate review stage rather than during the initial sentencing proceeding.¹⁸ Majority Opinion,

16. *Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976).

17. The state argued that confidentiality was essential to enable investigators to obtain sensitive disclosures. In addition to this contention, the plurality rejected the state's argument that full disclosure of presentence reports would cause unnecessary delay, finding that the problem had been "overstated" and observing that "if the disputed matter is of critical importance, the time invested in ascertaining the truth would surely be well spent if it makes the difference between life and death." *Id.* at 359-60, 97 S.Ct. at 1205. The state's contention that disclosure of psychiatric and psychological evaluations to the defendant could disrupt the process of rehabilitation, in the plurality's view, "has absolutely no merit in a case in which the judge has decided to sentence the defendant to death." *Id.* at 360, 97 S.Ct. at 1205.

18. The majority's broad declaration that "[t]he [appellate] court does not 'impose' sentence, and for that reason there cannot exist a due process violation under *Gardner*" indicates that its basis for distinguishing *Gardner* is not simply that it does not believe the appellate court considered nonrecord information in this case. To the extent the majority additionally relies on the Florida court's denial of petitioner's assertion that confidential information was considered and played a role in its review of sentencing decisions, I cannot agree with the majority's approach. The Florida Court received no evidence, rendered no hearing, afforded petitioners no cross-examination, and set forth no factual findings concerning the procedure at issue. In short, that part of the Florida court's opinion accepted by the majority

here as a "correct [] [] description of its function" is nothing other than a conclusory declaration by the Florida court that it acted properly. Irrespective of the adequacy of the state court's handling of petitioner's constitutional claim, surely our role in reviewing the serious constitutional issue raised by this habeas petition demands more than blind acceptance of conclusory remarks made by the state court, who in essence is an adversary in this proceeding. *Sumner v. Mata*, 449 U.S. 539, 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), cited by the majority, is inapposite, since it applies only to factual determinations made by a state court "after a hearing on the merits of a factual issue." *Id.* at 546, 101 S.Ct. at 768. See also 28 U.S.C. § 2254(d)(1). As noted above, the Florida court made no findings of fact but simply accepted, *arguendo*, the facts presented by the petitioners. Finally, I find the Florida court's assertion that nonrecord evidence plays no role in its capital sentence decisionmaking inexplicable. As Justice Marshall has noted,

If the court does not use the disputed nonrecord information in performing its appellate function, why has it systematically sought the information? Moreover, the court intimated that it does use the information, although in an undisclosed "procedural" manner. "The 'taunted' information we are charged with receiving was . . . in every instance obtained to deal with newly articulated procedural standards." 392 So.2d at 1333, n.17. Petitioners are entitled to the assurance either that such information is not sought and placed before the court, or that its use is circumscribed by appropriate safeguards.

Brown v. Wainwright, U.S. , 102 S.Ct. 542, 70 L.Ed.2d 407, 408 (1981) (Marshall, J., dissenting from denial of certiorari).

supra, at 443-44. The majority's argument that "there cannot exist a due process violation under *Gardner*" where the nonrecord information comes into play at the appellate level must proceed from one or both of the following premises: that rational appellate review is not an essential component of capital sentencing procedures under the eighth amendment, or that use of nonrecord information without notice to the defendant will not undermine the reliability of appellate review in the same way *Gardner* recognized it would affect the reliability of initial sentencing. Either premise is erroneous. A rational appellate review process is one of the two¹⁹ fundamental requirements of capital sentencing procedures established by the Supreme Court's 1976 death penalty decisions. See *Woodson v. North Carolina*, 428 U.S. at 303, 305, 96 S.Ct. at 2990, 2991 (plurality opinion); *Roberts v. Louisiana*, 428 U.S. at 335 & n.11, 96 S.Ct. at 3007 & n.11 (plurality opinion). Indeed, the Court relied on the appellate review provision in upholding the Florida statute under which petitioner was sentenced, viewing it as one of the means by which the statute assured that the death penalty would not be imposed on the basis of passion, prejudice, or any other arbitrary factor. *Proffitt v. Florida*, 428 U.S. at 250-53, 258-59, 96 S.Ct. at 2965-2967, 2969. Accord *Gregg v. Georgia*, 428 U.S. at 204-06, 96 S.Ct. at 2939-2940 (Georgia statute's appellate review provision ensures that death penalty will not be imposed capriciously). See also *Gardner v. Florida*, 430 U.S. at 360-61, 97 S.Ct. at 1205-1206 (trial judge's failure to make available to appellate court information he considered in imposing sentence renders sentencing procedure invalid). The careful consideration given by the Supreme Court to the adequacy of the Florida statute's

review process belies any suggestion that the Court did not consider appellate review integral to capital sentencing. See *Proffitt v. Florida*, 428 U.S. at 258-59, 96 S.Ct. at 2969. Second, the risk that an appellate court's reliance on nonrecord information, without providing notice to the defendant of the substance of that information or an opportunity to contest its accuracy, will result in the affirmance of a sentence on the basis of erroneous or misinterpreted information presents as grave a threat of the arbitrary imposition of death condemned in *Furman* as the risk involved when such a procedure is engaged in by the initial sentencer. The majority insists that there is no such risk involved here because the appellate court merely reviewed, and did not "impose," petitioner's sentence. If, in deciding to affirm petitioner's sentence, the Florida court reviewed and relied on undisclosed, and possibly inaccurate, information concerning petitioner's character and prison record, however, that court's disregard for the interests of petitioner and society that death sentences be predicated on reliable factfinding is no less egregious than the similar actions of the trial judge in imposing the sentence invalidated in *Gardner*. In both situations the "[a]ssurances of secrecy are conducive to the transmission of confidences which may bear no closer relation to fact than the average rumor or item of gossip"; in both the absence of defense counsel's participation precludes the adversarial debate our system recognizes as "essential to the truthseeking function." See *Gardner v. Florida*, 430 U.S. at 359, 360, 97 S.Ct. at 1205.

Nor do I consider a satisfactory explanation the Florida court's insistence that factfinding is foreign to its appellate review

which is also designed to ensure that the discretion exercised by sentencers will be an informed discretion, is that the defendant be allowed to present and have the sentencer consider evidence shedding light on his character, background, and the circumstances of the offense. *Eddings v. Oklahoma*, — U.S. —, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

19. The other requirement established in the 1976 cases, having been preordained by *Furman*, was the provision of standards and procedures to limit and direct sentencer discretion. E.g., *Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990; *Gregg v. Georgia*, 428 U.S. at 196-98, 199, 206-07, 96 S.Ct. at 2936, 2937, 2940-2941; *Proffitt v. Florida*, 428 U.S. at 253, 258, 96 S.Ct. at 2967, 2969. A third requirement emphasized in more recent cases,

function and that any nonrecord information it received was therefore superfluous to its decisions. For, notwithstanding the Florida court's attempt to deemphasize the evidentiary review aspect of its appellate function,²⁰ the essence of that function as recognized by the United States Supreme Court in *Proffitt v. Florida*, 428 U.S. at 253, 96 S.Ct. at 2567, is the "review[ing] and reweigh[ing]" of evidence of aggravating and mitigating circumstances "to determine independently whether the imposition of the ultimate penalty is warranted." *Id.* (citing *Songer v. State*, 322 So.2d 481, 184 (Fla.1975); *Sullivan v. State*, 303 So.2d 632, 637 (Fla.1974)).²¹ It is not at all inconceivable that, in performing this function, the Florida Supreme Court might decide to sustain a sentence's finding of aggravating circumstances on the basis of evidence that, although not before the sentence, nonetheless supports the sentence's finding. Such evidence, because untested by the adversary process, clearly could distort the court's appellate functions.²² The Florida court did not deny that it systematically requested and received nonrecord information concerning capital defendants; see *Brown v. Wainwright*, 392 So.2d at 1330, 1331; moreover it essentially admitted having used the information for some purpose by its state-

ment that "[t]he 'tainted' information we are charged with reviewing was . . . in every instance obtained to deal with newly-articulated procedural standards." *Id.* at 1330 n.17. See note 19 *supra*. The mystery that the Florida Supreme Court has chosen to leave unresolved concerning the purpose of its requests for and its use of nonrecord information only underscores the need for a complete factual record in this case. If, as the majority believes, the Florida court did not seek out or consider information not contained in petitioner's record, or if its receipt and use of such material was properly circumscribed by adequate procedural safeguards, these facts would surely be brought out through discovery or an evidentiary hearing. As noted above, however, petitioner has not yet been afforded discovery nor any other method of eliciting the facts pertinent to his claim. The majority's affirmance of the district court's denial of discovery on the ground that petitioner has presented insufficient evidence places petitioner in the impossible position of having to prove his claim as a prerequisite to being allowed to gather evidence to support it. This result is not merely illogical; it could promote the conclusion that the court is more concerned with expediting its admit-

ment to establish aggravating factor that crime was committed for pecuniary gain).

20. The Florida court suggested that the limited nature of its reviewing function—under which it "determine[s] if the jury and judge acted with procedural rectitude" and "compares the case under review with all past capital cases to determine whether or not the punishment is too great"—necessarily precluded its use, or misuse, of nonrecord information. See *Brown v. Wainwright*, 392 So.2d at 1331-33.

21. See also *Brown v. Wainwright*, U.S. , 102 S.Ct. 542, 544, 70 L.Ed.2d 407, 409 (1981) (Marshall, J. dissenting from denial of certiorari).

22. If the Florida Supreme Court's function in reviewing capital sentencing decisions had changed substantially since *Proffitt* was decided, that fact would call into question the continued vitality of the *Proffitt* holding—which as noted above upheld Florida's capital sentencing scheme partly on the basis of the appellate review process just described. A review of recent Florida Supreme Court decisions indicates, however, that the court does continue to review sentence findings for evidentiary sufficiency. *E.g.* *McCrae v. State*, 395 So.2d 1145, 1153 (Fla.1980) (evidence sufficient to establish aggravating circumstance that crime was especially heinous and cruel); *Peek v. State*, 395 So.2d 492, 499 (Fla.1980) (evidence insuffi-

When reviewing a sentence for procedural regularity, the court might uphold or vacate the sentence in part on grounds not considered by the trial court, or on factually erroneous grounds, because it has viewed ex parte unreliable, nonrecord information concerning the appellant. And when reviewing sentences for proportionality, the court's comparison of the sentences of other capital defendants with that of the appellant is rendered meaningless if the court has upheld or vacated the death sentences of other individuals after viewing this kind of information, or if the court used possibly erroneous information only as background data for its proportionality determination. The more systematic the practice of reviewing such information, the greater the danger of this second form of distortion.

tedly unpleasant task of reviewing state's capital sentencing decisions than it is with ensuring the reliability and consistency of those decisions as mandated by *Furman* under the eighth amendment. Respectfully I dissent.

On Rehearing

Before GODBOLD, Chief Judge, RO-
NEY, TJOFAT, HILL, FAY, VANCE,
KRAVITCH, JOHNSON, HENDERSON,
HATCHETT*, ANDERSON and CLARK,
Circuit Judges.

BY THE COURT:

A majority of the Judges in active service, on the Court's own motion, having determined to have this case reheard en banc.

IT IS ORDERED that this cause shall be reheard by the Court en banc on briefs with oral argument on a date hereafter to be fixed. The Clerk will specify a briefing schedule for the filing of supplemental briefs.

JUN 14 1983

ALEXANDER L. STEVAK,
CLERK

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1982

ALVIN BERNARD FORD,
Petitioner,

-v-

CHARLES G. STRICKLAND, JR.,
Warden, Florida State Prison;
LOUIE L. WAINWRIGHT, Secretary,
Department of Offender Rehab-
ilitation, State of Florida;
JIM SMITH, Attorney General,
State of Florida,

Respondents.

SUPPLEMENTAL APPENDIX
TO PETITION FOR WRIT OF CERT-
IORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

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IN THE
SUPREME COURT OF FLORIDA
CASE NO.

59732
FILED

SEP 29 1960

JOSEPH GREEN BROWN, ALVIN BERNARD FORD, JESSE RAY ~~PHILLIPS~~ WHITE
CARL ELSON SHRINER, DANIEL MORRIS THOMAS, AUBREY ~~BRUNN~~ BRUNN, COURT
JR., FRED LYMAN BRUMBLEY, DANIEL L. COLER, VERNON RAY COOPER,
GREGORY SCOTT ENGLE, DAVID LIVINGSTON FUNCHESS, ~~ROBERT D.~~
HEINEY, MARVIN E. JOHNSON, LESLIE R. JONES, ROBERT F. ^{Chief Justice} LEWIS,
BOBBY EARL LUSK, THOMAS McCAMPBELL, CHARLES DWIGHT MESSER,
FLOYD MORGAN, DONALD PERRY, JAMES LEROY PHIPPEN, JAMES DAVID
RAULERSON, JIMMIE LEE SMITH, WILLIAM GILVIN, BRYAN JENNINGS,
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VAUGHT, DAVID LEROY WASHINGTON, JAMES BUFORD WHITE,

Petitioners,

-v.-

LOUIE L. WAINWRIGHT, Secretary, Department of Corrections,
State of Florida,

Respondent.

APPLICATION FOR EXTRAORDINARY RELIEF AND
PETITION FOR WRIT OF HABEAS CORPUS

Petitioners, through their undersigned counsel, apply
to this Honorable Court for relief from their unconstitutional
sentences of death and further appropriate relief, and, in
support thereof, state:

I.

PARTIES

Petitioners are all death-sentenced inmates presently incarcerated at Florida State Prison in Starke, Florida, whose convictions and sentences were affirmed by or whose appeals are currently pending before this Court. (See Appendix A filed herewith).

Respondent, Louie L. Wainwright, is the Secretary of the Department of Corrections in whose custody the petitioners are detained.

II.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Article V, Section 3(b) (1), (7) and (9) of the Constitution of the State of Florida (1980). See Adams v. State, 380 So2d 421 (Fla. 1980); Graham v. State, 372 So2d 1363 (Fla. 1979); Proffitt v. State, 360 So2d 771 (Fla. 1978). Petitioners seek relief in this Court because the issues raised herein involve this Court's appellate review of capital cases and do not involve the proceedings in the trial courts. Petitioners have filed jointly in the interest of judicial economy because of the common issues of law and fact presented. See In Re Baker, 267 So2d 331 (Fla. 1972).

III.

FACTUAL BASIS FOR RELIEF

This Court, since at least as early as 1975, has engaged in the continuing practice of requesting and receiving information concerning capital appellants which was not presented at trial and not a part of the trial record or record on appeal. The information includes but is not limited to: presentence investigation reports concerning the capital offense under review or prior convictions unrelated to the capital offense; psychiatric evaluations or contact notes; psychological screening reports; recitations of a capital defendant's refusal

to submit to a psychiatric examination from which a report could be prepared; post-sentence investigation reports; probation or parole violation reports; and state prison classification and admissions summaries. Documentation of the practice is provided by the correspondence attached as Appendix B which is merely exemplary. Petitioners also attach in Appendix C newspaper accounts of the practice. While such accounts are admittedly hearsay, they are well-substantiated by the documents in Appendix B.

Except as to some of the presentence investigations pertaining to the offense on appeal the above information was requested and received without notice to the capital appellants or their attorneys.

Upon information and belief, a quantity of the information received by the Court, and of records reflecting the practice of requesting and receiving it as alleged in the preceding paragraph, has at the Court's direction been destroyed or purged from this Court's files. As a result, it is no longer possible for petitioners to identify all of the cases in which such information was requested or received.

IV.

LEGAL CLAIMS

The request or receipt by this Court of undisclosed information in capital cases, as described above, violates inter alia, petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 9 of the Constitution of the State of Florida; the right to counsel as guaranteed by the Sixth and Fourteenth Amendments to the Constitution of the United States and Article I, Section 16 of the Constitution of the State of Florida; the Eighth Amendment to the Constitution of the United States and Article I, Section 17 of the Constitution of the State of Florida; the privilege against self-incrimination as guaranteed by the Fifth Amendment to the Constitution of the United States and Article I, Section 9

of the Constitution of the State of Florida; the right to confrontation as guaranteed by the Sixth Amendment and Article I, Section 16 of the Constitution of the State of Florida; and the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and Article I, Section 2 of the Constitution of the State of Florida.

A. The Due Process Right to Fair Capital Procedures

The practice described above violates Gardner v. Florida, 430 U.S. 349(1977). In Gardner, the United States Supreme Court held unconstitutional the imposition of a death sentence where, in considering what sentence to impose, a Florida circuit court had ordered and relied on a pre-sentence investigation report, portions of which were not disclosed to the parties. The plurality emphasized that, in capital cases,

it is now clear that the sentencing process
as well as the trial itself, must satisfy
the requirements of the Due Process Clause

Id. at 358 (opinion of Mr. Justice Stevens). It held that due process was denied since "the death sentence was imposed, at least in part, on the basis of information which [petitioner] had no opportunity to deny or explain." Id. at 362. See also Green v. Georgia, 442 U.S. 95, 97(1979) and Presnell v. Georgia, 439 U.S. 14, 16(1978).

Gardner requires a similar conclusion here. The only real difference between Gardner and these cases is that here the secret information was gathered on appeal rather than at trial. Rather than providing a basis on which to distinguish these cases, this fact aggravates the unfairness to petitioners. The preparation of a pre-sentence report is a relatively normal and expectable occurrence in the trial court, and defense counsel might legitimately be expected to be on notice that such an event may happen, and, before Gardner at least, might engender confidential information. No lawyer familiar with Florida statutes, rules and procedures could be expected to anticipate, however, that without notice to the lawyer or the lawyer's client,

this Court would request or receive information dehors the record. Here, certainly no less than in Gardner, it would be a violation of the Fourteenth Amendment's Due Process Clause "to impose the death sentence on the basis of confidential information which is not disclosed to the defendant or his counsel." Gardner v. Florida, supra, 430 U.S. at 358.

It is a further violation of Due Process for this Court to have consulted "evidential facts not spread upon the record," Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292, 300 (1937), so that "even now we do not know the particular or evidential facts of which the [Court]... took judicial notice and on which it rested its conclusion." Id. at 302.

It is also a violation of due process for an appellate court to rely for disposition of an appeal upon factual grounds other than those relied upon by the trial court. Fresnell v. Georgia, supra; Eaton v. City of Tulsa, 415 U.S. 697 (1974); Cole v. Arkansas, 333 U.S. 196 (1948). To the extent that the affirmance of any of petitioners' cases was affected by information outside the trial record, their due process rights were further violated.

The Court's sua sponte consultation of extra-record materials and information in the consideration of capital appeals contravenes petitioners' fundamental rights to due process of law.

B. The Right to the Effective Assistance of Counsel

The guarantee of the effective assistance of counsel is as applicable on appeal as at trial. Anders v. California, 386 U.S. 738 (1967); Ross v. State, 287 So2d 372 (Fla.2d DCA 1973); Davis v. State, 276 So2d 846 (Fla.2d DCA 1973), aff'd 290 So2d 30 (Fla.1974). This right is denied not merely by the denial of counsel but by any hampering "restrictions upon the function of counsel in defending a criminal prosecution in accord with

the traditions of the adversary fact-finding process." Herring v. New York, 422 U.S. 853,857(1975). Accord: Ferguson v. Georgia, 365 U.S. 570(1961); Brooks v. Tennessee, 406 U.S. 605(1972); Geders v. United States, 425 U.S. 80(1976). In Gardner v. Florida, 428 U.S. 908,909(1976) certiorari was granted on both a Sixth and a Fourteenth Amendment question. In its decision, the Supreme Court of the United States held that "[e]ven though the defendant has no substantive right to a particular sentence within the range authorized by statute, the sentencing is a critical stage of the criminal proceeding at which he is entitled to the effective assistance of counsel." [Citing Mempa v. Rhay, 389 U.S. 128(1967) and Specht v. Patterson, 386 U.S. 605(1967)]. Gardner v. Florida, 430 U.S. 349,358(1977). Implementing Gardner, this Court has recognized that counsel must be afforded adequate time to prepare pertinent rebuttal evidence in order for a defendant to be given a meaningful "opportunity to be heard." Barclay & Dougan v. State, 362 So2d 657,658(Fla.1978). This Court's request for or receipt of confidential information, without notice to or access by petitioners and their counsel, violates the petitioners' rights because their counsel are afforded no opportunity to explain, deny, or place in context the information. The exclusion of counsel from the process of weighing such information proceeds from the:

erroneous premise that the participation of counsel is superfluous to the process of evaluating the relevance and significance of aggravating and mitigating facts. Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Gardner v. Florida, supra, 430 U.S. at 360. On the appeal of a capital case, no less than at trial, the Sixth Amendment guarantees "the guiding hand of counsel" to a criminal defendant. Powell v. Alabama, 287 U.S. 45,57(1932).

C. The Right to Confrontation

The Sixth Amendment provides that "[i]n all criminal prosecutions the accused shall enjoy the right . . . to be confronted with the witnesses against him." See generally Pointer v. Texas, 380 U.S. 400 (1965); Douglas v. Alabama, 380 U.S. 415 (1965).

The primary object of the constitutional provision in question was to prevent depositions or ex parte affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness, in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief.

Mattox v. United States, 156 U.S. 237, 242-243 (1895). A defendant's Confrontation Clause rights are not limited to trial of the case but attach wherever evidence is admitted relevant to the issues to be adjudicated. "A leading principle that pervades the entire law of criminal procedure is that, after indictment found, nothing shall be done in the absence of the prisoner." Lewis v. United States, 146 U.S. 370, 373 (1892). A defendant is entitled to confront the witnesses against him in any proceeding "after the case is called for trial which involves his substantial rights." Hopt v. Utah, 110 U.S. 574, 578 (1884). See also Rogers v. United States, 422 U.S. 35, 39-40 (1975). The evidence which this Court has received has never been tested by the equivalent of cross-examination, cf. Ohio v. Roberts, ___ U.S. ___ 100 S.Ct. 2531 (1980), and is of a notoriously unreliable sort (See ¶ D. infra). While in some limited circumstances, hearsay reports might be admissible if the prosecution makes a solid factual showing of the preparer's "unavailability" as a witness at the time of trial and if, in addition, the report bears adequate "'indicia of reliability'", Mancusi v. Stubbs, 408 U.S. 204, 213 (1972), in the present cases, defense counsel

were unaware of the very existence of the reports that may have affected the appeals in petitioners' cases. There was no opportunity here to confront the reports themselves and the consequences of this Court's request or receipt of the reports, let alone the preparers of the reports.

D. The Eighth Amendment Right to Reliability in Capital Sentencing

In Woodson v. North Carolina, 428 U.S. 280, 305 (1976) the Supreme Court recognized that, under the Eighth Amendment "death is a punishment different from all other sanctions in kind rather than in degree." "[T]his qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Accordingly,

[t]o insure that the death penalty is indeed imposed on the basis of 'reason rather than caprice or emotion,' we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. (Footnote omitted). Beck v. Alabama, U.S. ___, 100 S.Ct. 2382, 2389-90 (1980).

It is hard to conceive of evidence more fraught with danger when considered ex parte than the subjective psychiatric/psychological/correctional reports received by this Court, unsubjected to professional explanation and adversarial cross-examination. Addington v. Texas, 441 U.S. 418 (1979); Smith v. Estelle, 602 F.2d 694 (5th Cir.1979), cert. granted, 100 S.Ct. 1311 (1980). See generally, Ennis & Litwack, Psychiatry and the Presumption of Expertise: Flipping Coins in the Courtroom, 62 Calif. L. Rev. 693 (1974). As the Supreme Court of the United States stated in Kent v. United States, 383 U.S. 541, 563 (1966):

[T]here is no irrebutable presumption of accuracy attached to staff reports. If a decision on [the sentence of life or death] . . . is 'critically important' it is equally of 'critical importance' that the material submitted to the judge . . . be subjected, within reasonable

limits . . . to examination, criticism and refutation.

The risk that an appellant may be the victim of inaccurate information is precisely the same here as in Gardner. In a case where a mistake may send an appellant to his electrocution, the risk is simply not a constitutionally acceptable one:

From the point of view of the defendant [the penalty of death] is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion.

Id. at 357-358. See also Godfrey v. Georgia, ___ U.S. ___, 64 L.Ed. 2d 398, 409 (1980). In the words of Mr. Justice Overton, "often secrecy is considered the opposite of credibility," Forbes v. Earle, 298 So2d 1, 4 (Fla. 1974).

E. The Eighth Amendment Right to Proportionality in Capital Sentencing

The Eighth Amendment requires that the death penalty be applied in accordance with a rational and regular sentencing procedure which takes into account both the nature of the crime and the culpability of the individual offender. Woodson v. North Carolina, 428 U.S. 280, 303 (1976). The constitutionality of Florida's capital punishment statute was upheld in 1976 on the explicit assumption that review in this Court would be satisfactory to guard against capricious and disproportionate infliction of the death penalty:

[M]eaningful appellate review of each . . . [death] sentence is made possible, and the Supreme Court of Florida . . . considers its function to be to '[guarantee] that the [aggravating and mitigating] reasons present in one case will reach a similar result to that reached under similar circumstances in another case.... in light of the other decisions and determine whether or not the punishment is too great'. State v. Dixon, 283 So2d 1, 10 (1973).

Proffitt v. Florida, 428 U.S. 242, 251(1976). The secret use of sentencing evidence by this Court "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett v. Ohio, 438 U.S. 586, 605(1978). Accord: Beck v. Alabama, ___ U.S. ___, 100 S.Ct. 2382, 2389(1980).

The sua sponte request and receipt of evidence by this Court makes it impossible to assure either that the Court's general appellate function or the Court's role as the third step in the "trifurcated" sentencing process will not result in the capricious or disproportionate imposition of the death penalty. The formal record on the basis of which the death sentence is imposed will necessarily be incomplete, with parts of it invisible to counsel, to the trial courts, to the federal courts, and to this Court itself as Justices change over time. This is a constitutional defect, for the handling and treatment of confidential sentencing information in a death case is not simply a matter of this Court's discretion. In Gardner v. Florida, supra, the State argued that "trial judges can be trusted to exercise their discretion in a responsible manner, even though they may base their decisions on secret information." 430 U.S. at 360. The Court expressly rejected this argument as "clearly foreclosed," ibid., by Furman v. Georgia, 408 U.S. 238(1972) and "inconsistent with the basis upon which the Florida capital-sentencing procedure was upheld, Proffitt v. Florida, 428 U.S. at 254," id. at 360 n. 11. The Court recognized an Eighth Amendment right to a full and complete record in order to insure that the death penalty is applied proportionately and non-arbitrarily:

Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250, it is important that the record on appeal disclose to the reviewing court the considerations

which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital-sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia, Gardner v. Florida, *supra*, 430 U.S. at 361 (footnote omitted).

Further, where this Court opens itself to a major category or kind of information in some cases, but not others, proportionality is precluded.

Where neither the trial records nor this Court's decisions reflect accurately all of the information before the court in deciding capital cases, trial and appellate counsel, trial judges, and federal courts on review are deprived of the necessary basis on which to compare cases and insure that consistent standards are being applied in capital sentencing.

The receipt by this Court of different information in different cases -- information which was not before the trial jury or judge -- has eviscerated the system of checks and balances the trifurcated Florida death penalty structure was designed to guarantee. See Proffitt v. Florida, *supra*; Miller v. State, 332 So2d 65 (Fla. 1976); Messer v. State, 330 So2d 137 (Fla. 1976). It has destroyed the statewide "consistency, fairness, and rationality in the evenhanded operation of the state law" which the Supreme Court of the United States believed to be guaranteed by the Florida capital sentencing procedure when it found that procedure facially constitutional in Proffitt v. Florida, *supra*, 428 U.S. at 260. The Court's practice thus has prejudiced all capital appellants, both those for whom information may have been received and those for whom it was not.

F. The Right Against Self-Incrimination and the Right of the Assistance of Counsel in Deciding Whether to Exercise that Right

An interview with correctional employees or mental health professionals who are obtaining information from an inmate is fundamentally unlike a court-ordered psychiatric examination after a defendant has himself put his sanity in issue. In the

latter case, the defendant may be deemed to have waived the right to object to such an interview. In the former case, however, the Fifth Circuit has recently held that the State may not interview an inmate without notice and waiver of his rights, when the interview will subsequently be admitted in a capital sentencing proceeding, because the inmate has a Fifth Amendment right to refuse to participate in the interview and a Sixth Amendment right to consult with his counsel concerning whether to be interviewed. Smith v. Estelle, 602 F.2d 694(5th Cir. 1979), cert. granted, 100 S.Ct. 1311(1980).

It appears clear that in the present cases, as in Smith, the death row prisoners were not told that the information derived from interviews conducted by correctional employees or mental health professionals would be forwarded to this Court, nor were they told that they had a right to refuse to participate in the interviews. See Smith v. Estelle, supra at 602 F.2d 707-708. If, under the Fifth Amendment, "a defendant may not be compelled to speak to a psychiatrist who can use his statements against him at the sentencing phase of a capital trial." Smith v. Estelle, supra, 602 F.2d at 708, then that right was completely negated here.

Furthermore, petitioners were denied the advice of counsel at a critical stage of the sentencing proceedings in their cases. For, while an attorney may have no right to be present with an inmate during an interview by a psychiatrist, see United States v. Cohen, 530 F.2d 43(5th Cir.1976), the attorney has a highly important role in assisting the inmate to decide whether the inmate should waive his Fifth Amendment rights:

This is a vitally important decision, literally a life or death matter. It is a difficult decision even for an attorney; it requires a knowledge of what other evidence is available, of the particular psychiatrist's biases and predilections, of possible alternative strategies at the sentencing hearing. For a lay defendant, who is likely to have no idea of the vagaries of expert testimony and its possible role in a capital trial, and who may well find it difficult to understand, even if he is told, whether a psychiatrist is examining his competence, his sanity, his long-term

dangerousness for purposes of sentencing, his short-term dangerousness for purposes of civil commitment, his mental health for purposes of treatment, or some other thing, it is a hopelessly difficult decision. There is no reason to force the defendant to make it without 'the guiding hand of counsel' Powell v. Alabama, 287 U.S. 45, 57, 53 S.Ct. 55, 77 L.Ed. 158 (1933).

Smith v. Estelle, supra, 602 F.2d at 708-709. See also Brewer v. Williams, 430 U.S. 387, 398 (1977). These petitioners have been deprived of the advice of counsel as to their decisions whether to put their lives in the hands of prison personnel or other agents of the State. "The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." Tomkins v. Missouri, 323 U.S. 485, 489 (1945). Just as "a prisoner is not 'to be made the deluded instrument of his own conviction,' 2 Hawkins, Pleas of the Crown (8th ed. 1824), 595," Culombe v. Connecticut, 367 U.S. 568, 581 (1961) (opinion of Mr. Justice Frankfurter), neither may he be made the deluded instrument of his own execution.

G. Conclusion

The practice of this Court of requesting or receiving undisclosed information in capital cases has infected and prejudicially skewed its review of every death sentence. Under the Florida death penalty scheme, the ultimate safeguard for insuring that the process of imposing death sentences is fair, reliable and even-handed is the appellate review required to be provided by this Court. All capital appellants have suffered from this Court's practice of securing secret information. The capital sentencing process in Florida has been distorted from the form in which it was approved by the Supreme Court of the United States, and has become tainted at its highest and most important judicial level.

When the Court's decision is one involving the

ultimate penalty of death, the Constitution cannot tolerate anything short of full notice and disclosure of any and all facts being fed into the life and death equation. One of the tripartite pillars of the trifurcated sentencing process of Florida has become cracked.

V.

PRAYER FOR RELIEF

Based upon the foregoing, petitioners respectfully request their unconstitutional sentences of death be vacated and that the Court grant such other relief as may be deemed proper.

Respectfully submitted,

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ATTORNEY FOR PETITIONER:

James Buford White

BY:

Marvin F. Frankel
MARVIN E. FRANKEL (by Mr.)

Albert J. Datz
ALBERT J. DATZ

Samuel S. Jacobson
SAMUEL S. JACOBSON

Deborah Fins
DEBORAH FINS

David E. Kendall
DAVID E. KENDALL (by Mr.)

Anthony G. Amsterdam
ANTHONY G. AMSTERDAM (by Mr.)

Michael J. Minerva
MICHAEL J. MINERVA

David J. Busch
DAVID J. BUSCH (by Mr.)

Louis G. Carres
LOUIS G. CARRES

Michael M. Corin
MICHAEL M. CORIN

Judith J. Dougherty
JUDITH J. DOUGHERTY

Margaret Good
MARGARET GOOD

Theodore E. Mack
THEODORE E. MACK

Carl S. McGinnes
CARL S. MCGINNES

James R. Wulchar
JAMES R. WULCHAR

Paul C. Helm
PAUL C. HELM

Karen M. Gottlieb
KAREN M. GOTTLIEB (by Mr.)

Elliot H. Scherker
ELLIOT H. SCHERKER (by Mr.)

RICHARD L. JORANDBY

CRAIG S. BARNARD

JERRY L. SCHWARZ

RICHARD B. GREENE

ELLEN S. MORRIS

JON MAY

CLIFFORD L. DAVIS

WILLIAM P. WHITE, III

PHILLIP JOHN PADOVANO

JOSEPH JORDAN

(4987)

CERTIFICATE OF SERVICE

I DO HEREBY CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32304 by hand delivery this 29th day of September, 1980.


SAMUEL S. JACOBSON
of counsel

IN THE SUPREME COURT OF FLORIDA

JOSEPH GREEN BROWN, et al.,

Petitioners

-v.-

LOUIE L. WAINWRIGHT, Secretary,
Department of Corrections,
State of Florida,

Respondent.

CASE NO.

APPENDICES TO
APPLICATION FOR EXTRAORDINARY RELIEF AND
PETITION FOR WRIT OF HABEAS CORPUS

APPENDIX A

(Petitioners' Names & Case Numbers)

| | | | |
|---------------------------|---------|-------------------------|---------|
| Joseph Green Brown | #46,925 | John P. Maggard | #51,614 |
| Alvin Bernard Ford | #47,059 | Nollie Lee Martin | #53,716 |
| Jesse Ray Rutledge | #48,801 | Windford Mines | #50,996 |
| Carl Elson Shriner | #51,749 | Eldred Lonnie Moody | #52,907 |
| Daniel Morris Thomas | #51,692 | James A. Morgan | #53,413 |
| Aubrey Dennis Adams, Jr. | #56,134 | Tommy Lee Randolph | #54,369 |
| Fred Lyman Brumbley | #56,006 | James Franklin Rose | #51,724 |
| Daniel L. Coler | #54,250 | Paul William Scott | #58,388 |
| Vernon Ray Cooper | #45,966 | Willie Clayton Simpson | #49,681 |
| Gregory Scott Engle | #57,708 | Terry Melvin Sims | #57,510 |
| David Livingston Funchess | #47,328 | Henry Perry Sireci, Jr. | #50,905 |
| Robert D. Heiney | #56,778 | Joseph Robert Spaziano | #50,250 |
| Marvin E. Johnson | #56,167 | Jesse Joseph Tafero | #49,515 |
| Leslie R. Jones | #56,199 | Solomon Webb | #58,306 |
| Robert F. Lewis | #50,851 | William Glenn Welty | #55,497 |
| Bobby Earl Lusk | #59,146 | William Melvin White | #55,875 |
| Thomas McCampbell | #57,026 | Gary Eldon Alvord | #45,542 |
| Charles Dwight Messer | #49,780 | | 57,810 |
| Floyd Morgan | #54,939 | Anthony Antone | #50,240 |
| Donald Perry | #53,003 | Luis Carlos Arango | #59,673 |
| James Leroy Phippen | #54,664 | Sampson Armstrong | #48,316 |
| James David Raulerson | #47,991 | Ellwood Barclay | #47,260 |
| Jimmie Lee Smith | #55,961 | Richard Blair | #58,072 |
| William Gilvin | #58,743 | Bernard Bolander | #59,333 |
| Bryan Jennings | #59,299 | Stephen Todd Booker | #55,568 |
| Richard King | #59,464 | Theodore Bundy | #57,772 |
| Gregory Mills | #59,140 | Johnny Copeland | #57,798 |
| Robert Lewis Buford | #54,010 | Preston Crum | #57,487 |
| William Christopher | #55,693 | Willie Jasper Darden | #45,056 |
| Raymond Robert Clark | #52,716 | | 45,108 |
| Robert Combs | #59,425 | Bennie Damps | #54,249 |
| Raymond L. Drake | #54,580 | Ernest John Dobbett | #45,558 |
| Earl Edmund | #48,525 | Howard Virgil Douglas | #44,864 |
| William Jent | #58,744 | John E. Ferguson | #55,137 |
| Amos Lee King | #52,185 | | 55,498 |
| Harold G. Lucas | #51,135 | Charles Kenneth Foster | #48,380 |
| | | Arthur F. Goode, III | #51,480 |
| Anthony Ray Peek | #54,226 | | 59,453 |
| Raleigh Porter | #55,841 | Freddie Lee Hall | #54,423 |
| M.C. Ruffin | #55,684 | | 54,561 |
| Donald Walsh | #59,512 | Carl Jackson | #48,165 |
| Johnny Paul Witt | #45,796 | Eligaah Ardalle Jacobs | #49,345 |
| | 58,329 | Thomas Knight | #47,399 |
| Steven Beattie | #56,569 | John Wallace LeDuc | #47,953 |
| McArthur Breedlove | #56,811 | Paul Edward Magill | #51,699 |
| Alonzo Bryant | #53,230 | Roy McKennon | #54,172 |
| Bobby Marion Francis | #50,127 | Douglas Ray Meeks | #47,533 |
| Marvin Francois | #54,461 | | 48,080 |
| Lenson Hazgrave | #48,135 | Mark Mikenas | #49,928 |
| Ronald Jackson | #47,269 | Eddie Odom | #50,575 |
| Antonio Menendez | #49,294 | Timothy Palmes | #52,045 |
| Thomas Perri | #57,142 | Charles W. Proffitt | #45,541 |
| Wardell Riley | #49,666 | Michael Salvatore | #48,513 |
| Leon Scott | #56,419 | Frank Smith | #57,743 |
| Roy Stewart | #57,971 | Carl Ray Songer | #45,584 |
| Merle Sturdivad | #59,416 | | 52,642 |
| Gary Trawick | #57,077 | Walter Steinhorst | #55,087 |
| Manuel Valle | #54,572 | Rufus Stevens | #57,738 |
| James Adams | #45,450 | Raymond R. Stone | #48,275 |
| Levis Leon Aldridge | #46,598 | Ronald Straight | #52,460 |
| Allen L. Anderson | #52,771 | Robert A. Sullivan | #44,750 |
| David Ross Delap | #56,235 | William Lee Thompson | #55,697 |
| William Duane Elledge | #52,272 | Charles Vaught | #52,835 |
| George Victor Franklin | #52,971 | David L. Washington | #50,832 |
| William Lanay Harvard | #47,052 | | 50,833 |
| James E. Hitchcock | #51,108 | | 50,850 |
| Monroe Holmes | #48,392 | James Buford White | #54,292 |

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Arch Carey,
Clerk's Office
Supreme Court

Requested OSI / Psychological
Evaluation - advised we had
needed - referred her to
Ed Stanish, D.C. for genuine
psych. eval

J. Jones

Copy from J. 4418 Lee Jones
File # 039425 - copy made
on 9-5-80
S-D CT # 44,669

original is dated 1/11/75 or 4/11/75

MEMO TO THE FILE

August 29, 1975

Michael E. Provence CO# 175442

On 8/29/75 I was notified by Mr. Boone in our Bradenton office that the Florida Supreme Court had ordered the Clerk of the Manatee County Circuit Court to submit a copy of the PSI to the Court in this case. From reviewing this file it appears that Provence was convicted by jury of Murder In The First Degree on 10/24/74 and it appears that the jury recommended a sentence of Life. Judge Gilbert A. Smith ordered a PSI (contrary to 948.01(a)F.S.) and after it was submitted, Judge Smith sentenced this individual to Death. A review of the report indicates that Officer Thomas S. McCall might have gotten emotionally involved in his report but in the Analysis he made a recommendation that Provence be sentenced to Death. It is believed that Provence is appealing the conviction as well as the sentence and therefore the Supreme Court has asked for a copy of the PSI. The Clerk of the Circuit Court was trying to obtain a copy of the PSI from Mr. Boone who was reluctant to cooperate, to the degree that the Clerk was trying to obtain a court order. I asked Mr. Boone to discuss this with Judge Smith who had no objections to Mr. Boone supplying the Clerk with a copy of the factual part of the PSI but explicitly instructed him not to supply the Clerk with a copy of the Confidential Section.

I have specifically instructed Mr. Boone and Mr. Otts to discuss this situation with Judge Smith, in hopes that no further request for PSI's on possible death cases be ordered. Besides being contrary to law, this is grossly unfair to our staff and the officer can be blamed for the Judge's decision, even though the Court will accept the blame themselves. Mr. Otts believes that Judge Smith will understand our problem and cooperate.

KJ
WOK

IN THE CIRCUIT COURT, IN AND FOR MANATEE COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs.

MICHAEL EDWARD PROVENCE,

Defendant.

DISTRICT 13
RECEIVED

SEP 22 1975

Case No. 73-4197

RECEIVED
JANUARY 1976

ORDER

THIS CAUSE having come on before this Court on the order of the Florida Supreme Court to supplement the Record by including the presentence investigation, and this Court having supplemented the Record by directing the inclusion of the objective, nonconfidential portion of the presentence investigation, this Court hereby finds:

1. That there is a confidential portion of the presentence investigation which was considered by the Court and that the confidential portion of the presentence investigation is presently in the custody of the Parole and Probation Commission,

2. That the order of the Florida Supreme Court does not specifically direct inclusion of the confidential portion of the presentence investigation, and it is hereby

ADJUDGED that until further notice from the Florida Supreme Court, the Parole and Probation Commission shall not furnish the confidential portion into the Record on this case.

ORDERED at Bradenton, Florida, this 19th day of September, 1975.

Gilbert A. Smith
GILBERT A. SMITH
CIRCUIT JUDGE

STATE OF FLORIDA, COUNTY OF MANATEE
This is to certify that the foregoing is a true and correct copy of the documents on file in my office.
Witness my hand and official seal this 22nd day of September, 1975.
U. T. Adams,
Clerk of Circuit Court

175-442

FLORIDA PAROLE AND PROBATION COMMISSION
Inter-Office Communication

Date: 9/23/75

To: Mr. Paul Murchek, Director
ATTN: Mr. William Kyle
From: Floyd E. Boone
Re: Michael Edward Provence

Office: COURT ORDER/1st DEGREE MURDER
Office: 13 - Bradenton
Co. No. U/K Dist. No. 13-19701

Please find attached a court order signed by Circuit Judge Gilbert A. Smith on 9/19/75, stipulating that the Florida Parole and Probation Commission shall not furnish the confidential portion into the record in this case.

FEB/em

F.B.

cc: Mr. Otts

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D., 1975
THURSDAY, SEPTEMBER 25, 1975

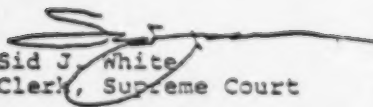
MICHAEL EDWARD PROVENCE, *
Appellant, *
vs. *
STATE OF FLORIDA, *
Appellee. *

CASE NO. 46,671

It is hereby ordered that the confidential portion of the presentence investigation in the above styled cause, presently in the custody of the Parole and Probation Commission, be forwarded to this Court.

A True Copy

TEST:


Sid J. White
Clerk, Supreme Court

TC

cc: Hon. Gilbert A. Smith, Judge
Hon. M. T. McInnis, Clerk
Hon. Charles H. Livingston
Hon. Robert L. Shevin
Florida Parole and Probation Comm.

September 26, 1975

The Honorable Sid J. White, Clerk
Supreme Court
Tallahassee, Florida

RE: Michael Edward Provence
vs.
State of Florida
Case No. 46,671

Dear Mr. White:

Persuant to the Supreme Court decision of September 25, 1975, please find attached the Presentence Investigation on the above-named.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

HTD:kb

Attachment

September 19, 1975

Michael Edward Provence
vs.
State of Florida
Case #46,671

The Honorable Sid J. White
Clerk, Supreme Court of Florida
Tallahassee, Florida, 32304

Dear Mr. White:

Pursuant to the Supreme Court Order dated September 25, 1975, please find attached the Presentence Investigation concerning the above named individual.

Very truly yours,

Ray E. Howard
Chairman

D/cw

Attachment: Pre-sentence Investigation

MEMO TO THE FILE

September 10, 1975

RE: Charles Messer
CO#139613

On 9-18-75 Mrs. Sara Gainey of the Clerk's office, Supreme Court called to request a copy of the pre-sentence investigation in this case.

After this matter was discussed with Mr. Howard and Mr. Murchek and Mr. Simmons it was determined that we would give them a pre-sentence if it was available.

After reviewing the file, it was found that there was no pre-sentence and Mrs. Gainey was advised this date that there was no pre-sentence available in this case.

/cz

Handwritten signature
b.

IN THE SUPREME COURT OF FLORIDA .

CHARLES DWIGHT MESSER, :
Appellant, :
v. : CASE NO. 49,780
STATE OF FLORIDA, :
Appellee. :
_____ :

PETITION FOR REHEARING

Petitioner, CHARLES DWIGHT MESSER, by his undersigned counsel, hereby petitions this Court pursuant to Florida Appellate Rule 3.14 to grant rehearing on the issues raise in this appeal, and petitioner respectfully suggests that this Court omitted or neglected to fully consider the following:

A. Defendant's Pending Motion To Clarify And The Failure Of The Trial Court To Provide The Pre-Sentence Investigation Report.

On June 16, 1977, this Court directed the trial judge below to file a response stating whether he imposed the death sentence in consideration of any information not known to appellant. This Court also directed the trial judge to furnish copies of his response along with copies of any sentencing information to the Court and both counsel for the state and counsel for appellant. This directive was issued by this Court pursuant to Gardner v. Florida, 430 U.S. 349 (1977).

On September 26, 1977 the trial judge issued his response stating twice that he had considered a pre-sentence investigation report and further stating that he was ordering the Clerk of the Court to send copies of that report along with copies of psychiatric and psychological reports to this Court. Upon receipt of the trial judge's response, counsel for appellant timely

filed, on October 3, 1977, a motion in this Court requesting that the trial judge be required to clarify his response to indicate whether these reports had been furnished to appellant or his trial counsel. This was necessary because although the trial judge had indicated that he saw a pre-sentence investigation report, he did not state whether that report had been furnished to the defendant or trial counsel. As of this date, counsel for appellant has received no response to his motion, has received no response from the trial judge, and no copies of the reports have been filed in this Court or furnished to counsel for appellant.

Pursuant to Florida Appellate Rule 3.9, counsel for appellant had the right to believe that the proceedings in this cause were suspended until his motion was disposed of or at the very least, until this Court had reviewed the reports and determined whether there had been a violation under Gardner, supra. However, on April 26, 1979, this Court issued its opinion affirming appellant's conviction with no mention, whatsoever, of the possible Gardner violation. Counsel for appellant, upon receiving this opinion, checked his file and then checked this Court's file to determine what action, if any, had been taken pursuant to his motion. Upon reviewing this Court's file, counsel for appellant could find no action taken on his motion, no pre-sentence investigation or psychiatric reports, and by checking the Clerk's docket, could find no indication that any such reports had been furnished to the Court. This Court's records do contain a letter from someone stating that they had no pre-sentence investigation report on appellant. This, however, does not mean that such a report was not prepared and certainly does not explain the trial judge's

emphatic response that he had reviewed such a report. Appellant would contend that such facts warrant a full hearing at the trial level to determine exactly what happened to the pre-sentence investigation report and to determine exactly what the trial judge considered at sentencing that was not furnished to appellant or his trial counsel. Since Gardner, supra, seems to require not only a disclosure of such a pre-sentence investigation report but also a review of that report by this Court, it is essential that the report be provided as ordered by the trial judge. Until a determination has been made by the trial court on this matter, all proceedings in this case should be stayed and this Court should withdraw its opinion of April 26, 1978, pending a full review of the possible Gardner violation.

B. Secret Psychological Report Ordered By This Court

It must also be noted here in appellant's petition for rehearing that while reviewing this Court's record on appeal in this case, counsel for appellant found a copy of a letter from this Court to the Department of Offender Rehabilitation requesting a copy of the latest psychological report pertaining to the appellant. No copy of this letter was ever furnished to counsel for appellant. Counsel for appellant is aware that the Florida State Prison conducts psychological screening reports on all new inmates. Counsel for appellant also has personal knowledge that in other death cases pending before this Court, that this Court has requested and received such psychological reports without appellate counsel being notified. Upon finding a copy of this letter in the Court file, counsel for appellant attempted to determine if this Court had received such a report but counsel was informed that after the Gardner decision, all death cases were "purged" of such

Under these circumstances, counsel for appellant would request that this Court conduct a full hearing of its own to determine whether or not the psychological screening report was received and the date on which it was received by this Court, when and under whose direction that report was destroyed, and whether or not that report was read and considered by any members of this Court.

Counsel for appellant feels that he must raise this question in his petition for rehearing in order to avoid any waiver of his client's rights. It is apparant, however, that this Court's actions have raised a question that must be resolved pursuant to Gardner, supra, to determine whether the death sentence was imposed on appellant, at least in part, on the basis of a record containing information of which he had no knowledge or opportunity to deny or explain.

It is clear that any secret report is not permissible in death penalty proceedings and violates the process which the defendant is due in such cases. See Gardner, supra, at page 360. Review by this Court is clearly part of the procedure employed in this state for determining which persons receive the death penalty. As noted by Justice White in his concurrence Gardner, supra, at 364:

"A procedure for selecting people for the death penalty which permits consideration of such secret information relevent to the 'character and record of the individual offender,' . . . [Woodson v. North Carolina, 428 U.S. at 304], fails to meet the 'need for reliability in the determination that death is the appropriate punishment' which the Court indicated was required in Woodson, supra, at 305."

It should also be noted that if psychological reports were before the Court in any other cases then

"Since the state must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S., at 250, it is important that the record on appeal disclosed to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida Capital Sentencing Procedure would be subject to the defects which resulted in the holding of unconstitutionality in Furman v. Georgia."

C. Allowing Opinion Which Reaches The Ultimate Issue
Being Determined To Be Offered By Jury To Prosecutor.

Concerning this Court's opinion filed on April 26, 1977, in the above styled cause, counsel for appellant would respectfully point out that by determining that the State Attorney could give his opinion as to aggravating and mitigating circumstances present, this Court not only failed to point out what rule of evidence allowed such testimony, it also failed to recognize that by making such a ruling it was overturning long-standing case law on the subject. As recently as this year, the Second District Court of Appeal had pointed out in Mills v. State, 367 So.2d 1068, 1069 (Fla. 2nd DCA, 1979) that:

"A non-expert witness may not express opinions or conclusions which the jury could draw from the facts to which he had testified."

Moreover, the court in Mills pointed out that such error was clearly reversible because the opinion dealt with the ultimate issue to be decided.

In the sentencing portion of a death case, the ultimate issue to be determined by the jury is what aggravating and mitigating circumstances exist and whether or not the aggravating circumstances outweigh the mitigating circumstances. By allowing the

State Attorney's opinion testimony on the ultimate issue to be decided this Court has either: (1) overruled the long-standing case law pertaining to such testimony or (2) determined that error which would otherwise be reversible in other types of criminal cases is not reversible in a death case.

D. Allowing Testimony To Negate Mitigating Factors.

In determining that it was proper for the State Attorney to take the stand and testify at the second sentencing hearing, this Court stated at page three of its opinion:

"The state sought to present this testimony in order to counter any inference, unfavorable to the state's case on this issue of sentence, that the jury might draw from being informed of the final disposition of the charges against the accomplice. The testimony also tended to negate various statutory mitigating circumstances. We hold that the state attorney's testimony was relevant for these purposes and was properly admitted." (emphasis added)

After finding that it was proper for the State Attorney to testify in order to negate various mitigating circumstances, this Court goes on to find at page three:

"We find further from the record that there was no evidence tending to establish the existence of any mitigating factors. The sentence of death was proper."

Counsel for appellant is in a quandary as to why, if there were no mitigating factors, would the State Attorney be allowed to testify to negate them. On the other hand, if the State Attorney had to be allowed to testify to negate mitigating factors, then evidence of mitigating factors must have been present that the jury could have considered. It appears as if the decision allows the State to have its cake and eat it too. The problem can be resolved in one of two ways, either by finding that no mitigating factors

existed, thus requiring a new sentencing proceeding wherein the State Attorney would be prohibited from testifying, or, in the alternative, by finding that mitigating factors did exist, in which case a new sentencing hearing is required based on the fact that this Court had ruled out but all two of the aggravating factors argued below. See Elledge v. State, 346 So.2d 998 (Fla. 1977).

The State Attorney's testimony raises an additional problem when this Court allows the State to negate mitigating factors that the Court finds do not exist. If this Court allows its decision to stand, the state will hereafter be allowed to argue at sentencing proceedings the absence of mitigating factors. Such a ruling directly conflicts with this Court's decision in Mikenas v. State, 367 So.2d 606 (Fla. 1978). In that decision, this Court held that it was error for the trial judge to consider a non-statutory aggravating circumstance which was the antithesis of a mitigating circumstance. In so doing, this Court declared that it was improper to consider the lack of a mitigating circumstance as an aggravating circumstance. In this instant case, to allow the State to negate mitigating factors which this Court determined do not exist, is the same as allowing the State to argue the lack of mitigating factors as an aggravating factor. This is in direct conflict with Mikenas.

E. Erroneous Resolution Of Aggravating/Mitigating Issues.

Finally, counsel for appellant would urge that this Court's elimination of all but two aggravating circumstances requires that appellant be remanded to trial court for a new sentencing proceeding. Obviously, the State and this Court believe that there was

sufficient evidence of mitigating factors present as shown by the fact that the State was permitted to present the State Attorney's testimony to negate those factors. Indeed, the testimony of Dr. McMahon, alone, was sufficient to give the jury reason to find one mitigating circumstance, that of impairment of appellant's capacity to appreciate the criminality of his conduct. See Shue v. State, 366 So.2d 387 (Fla. 1978). This Court cannot stand as the trier of fact and determine that the sentencing jury did not consider Dr. McMahon's testimony of appellant's mental state as establishing a mitigating factor to be weighted against the aggravating factors presented, since no specific findings were returned by the jury. As pointed out by this Court in Shue v. State, supra:

"It is impossible to say that there was no reasonable basis for the jury to have concluded that some mitigating circumstances existed sufficient to outweigh the aggravating circumstances."

Furthermore, as the United States Supreme Court has pointed out in Lockett v. Ohio, ___ U.S. ___, 98 S.Ct. ___, 57 L.Ed.2d 973, 990 (1978):

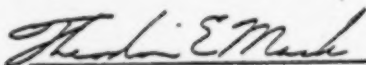
. . . "The Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

In the instant case it is entirely possible that the jury considered at least one mitigating circumstance to be weighted against the several aggravating circumstances presented by the State because evidence of such a mitigating factor was presented to them. Since this Court has corrected the trial court to show that only two aggravating factors could have existed, the aggravating and

mitigating factors must now be placed back before the jury to determine if the mitigating factors now outweigh the aggravating.

WHEREFORE, appellant prays this Court will grant re-hearing in this case, require hearings on the Gardner issues presented, and remand this case for a new sentencing proceeding in accordance with this Court's findings relating to the aggravating and mitigating circumstances present.


Respectfully submitted,


THEODORE E. MACK
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida 32302
(904) 488-2458

Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing motion was furnished by hand-delivery to the Honorable Jim Smith, Attorney General, the Capitol Building, Tallahassee, Florida, on this 10th day of May, 1979.


THEODORE E. MACK

September 10, 1975

RE: Clarence Robert Purdy
CO#176763

On 9-18-75 Mrs. Sara Gainey of the Clerk's office, Supreme Court called to request a copy of the pre-sentence investigation in this case.

After this matter was discussed with Mr. Howard and Mr. Murchek and Mr. Simmons it was determined that we would give them a pre-sentence if it was available.

After reviewing the file, it was found that there was no pre-sentence and Mrs. Gainey was advised this date that there was no pre-sentence available in this case.

/cr

Copy B

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18

MEMO TO THE FILE

September 10, 1975

RE: George Thomas Vasil
CO#175497

On 9-18-75 Mrs. Sara Gainey of the Clerk's office, Supreme Court called to request a copy of the pre-sentence investigation in this case.

After this matter was discussed with Mr. Howard and Mr. Murchek and Mr. Simmons it was determined that we would give them a pre-sentence if it was available.

After reviewing the file, it was found that there was no pre-sentence and Mrs. Gainey was advised this date that there was no pre-sentence available in this case.

/cr

Just B

WEDNESDAY, DECEMBER 3, 1975

| | | |
|-------------------|----|-----------------|
| RONALD JACKSON, | ** | |
| Appellant, | ** | |
| vs. | ** | CASE NO. 47,269 |
| STATE OF FLORIDA, | ** | |
| Appellee. | ** | |
| | ** | |

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable James C. Adkins, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 3rd day of December, 1975.

Sid J. White

Clerk of the Supreme Court of Florida.

Honorable Paul M. Murchek
Law Offices of Jack J. Taffer
Honorable Carolyn M. Snurkowski

A TRUE COPY

Atty. Gen.

Sid J. White, Clerk

Supreme Court of Florida

By T. O. [Signature]
Deputy Clerk

| | | | |
|----|----|----|--|
| 4 | 24 | 75 | Motion of Appeal |
| 7 | 11 | 75 | Leave (15 vols) |
| 10 | 1 | 75 | Appellant's Briefs |
| 10 | 3 | 75 | Appellants Mot. on to Supplement Record on Appeal |
| " | " | " | Request for O.A. |
| 10 | 7 | 75 | Appellants Motion to Supplement Record on Appeal Granted |
| 10 | 8 | 75 | State's Exhibit #11 & #12 (Photograph) |
| 10 | 23 | 75 | Appellee's Motion for ext. of time til |
| 11 | 21 | 75 | Appellee's Briefs |
| 11 | 25 | 75 | O.A. granted |
| 12 | 3 | 75 | Order asking Parole Commission to transmit pre-sentence investigation to the Clerk |
| 12 | 9 | 75 | Copy of Pre-sentence investigation |
| 6 | 15 | 77 | Order of the Court ordering trial judge to respond in 20 days re. Gordon decision |
| 7 | 7 | 77 | Response to Supreme Court |
| 11 | 16 | 78 | Appellant (P) judgment & sentence are affirmed |
| 11 | 8 | 78 | Motion to withdraw |
| 11 | 8 | 78 | Mot for ext. of time to file Pet for Review |
| 11 | 8 | 78 | Mot for Appoint Office of P.D. & Mot of Appeal |
| 11 | 8 | 78 | Appellant's of Shaslow |
| 11 | 9 | 78 | Order - grant. Mot to withdraw; Mot ext. of time. App. P.D. to file |
| 11 | 17 | 78 | Motion for Extension of time 12/11/78 |
| 12 | 11 | 78 | Pet. for Rehearing |
| 12 | 20 | 78 | Order |
| 12 | 20 | 78 | Motion to strike Pet. Return for rehearing |
| 12 | 20 | 78 | Order on Motion to Strike |
| 12 | 20 | 78 | Ext. for ext. of time |
| 12 | 20 | 78 | Order on Ext. of time |
| 2 | 15 | 79 | Pet. Stricken (see Order - Motion to Strike granted) |
| " | " | " | Final Order order, no relief requested - case is final |

| | | | |
|----|----|----|---|
| 3 | 2 | 79 | Petition for Rehearing of Order striking "Petition for Rehearing... and/or limit of Habeas Corpus." |
| 3 | 2 | 79 | Exhibits 1 vol. |
| 3 | 14 | 79 | Order returning Pet for rehearing as filed improperly |
| 5 | 7 | 79 | Letter from U.S. Supreme Court concerning cost of time to file writ of certiorari |
| 10 | 8 | 79 | Order from U.S. Sup Ct denying Cert. |
| 10 | 29 | 79 | Letter from U.S. Sup Ct advising rehearing was filed 10/23/79 |
| 11 | 28 | 79 | Letter from U.S. Sup Ct denying rehearing |

12/15/25

Sarah Cairney

Clerk's Office, Supreme Ct

Called for PSI -

w/ send order

J. Butler

JULY TERM, A. D. 1975

TUESDAY, DECEMBER 16, 1975

DAVID LIVINGSTON FINCHES,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

**

**

**

**

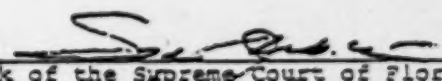
**

**

CASE NO. 47,828

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable James C. Adkins, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 16th day of December, 1975.


Clerk of the Supreme Court of Florida.

cc: Honorable Paul M. Murchek
Honorable Louis G. Carres
Honorable Carolyn M. Snurkowski

December 18, 1973

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

RE: David L. Funchess
v.
State of Florida
Case No. 47,823

Dear Mr. White:

With respect to the court's order of December 16, 1973,
find attached the Commission's presentence investigation
conducted in the case of the above-named.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

HTD:kb

March 22, 1976

Honorable Sid White
Clerk of the Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

Re: Douglas R. Meeks, #046346


Dear Mr. White:

Attached is a copy of the Psychological Screening Report on Mr. Meeks which you requested on March 22, 1976. This is the initial psychological done on Mr. Meeks. We do not have a psychiatric report in our file.

If we can be of further assistance, please let us know.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY


Ronald B. Jones
Deputy Director for Inmate Treatment

RBJ/pwb

Enclosure

March 31, 1975

Florida Division of Corrections - Reception and Medical Center

AMC-10-171

PSYCHOLOGICAL SCREENING REPORT

Name MEEKS, DOUGLAS, R. Number 046346 Age 21 Race Black
 Offense First Degree Murder Sentence Death
 Test MMPI, SCT, BGVT 1071-79 Intelligence Inferior
 Education: (verified: yes no) Grade Completed 11 College no Age 21
 Reason for not completing education Went to Work
 Literacy: Reading Level Relative Grade
 Vocation: (unverified) Fruit picker; plumbers helper
 Present Interest Appeal
 Special Difficulties Nature of sentence

PSYCHOLOGICAL OBSERVATIONS:

Subject's general attire appeared slightly below average. It was difficult to elicit spontaneous conversation from Meeks and most of his answers were extremely short. Subject possessed an optimistic attitude regarding his appeal and hoped to be back into the free world in a relatively short period of time. Discreet behavioral tremors were detected when discussing the crime which included leg shaking, hand wringing, and knuckle cracking. No delusional material, loose associations or hallucinatory imagery was elicited. He was well oriented as to time, place, and person and psychopathology was ruled out. His intellectual capacity, however, and ability to abstract as a result of that capacity was felt to be inferior. Rapport was felt to be genuine.

Meeks presents himself as a very inadequate and easily led individual. As indicated above his intellectual capacity is considered to be inferior and it seems as though he lacks ability to appropriately assess alternatives in a normal manner. Subject claimed during the interview to have been committed to the University of Jackson Mississippi Mental Ward in 1969 because he was considered to be aggressive by others in his community in Darling, Mississippi. He related a past juvenile aggressive background including overt aggressive acts toward his family when he was younger. His father died when subject was three and he was raised mainly by his mother. There are six other siblings in the family, three boys and three girls. Subject further related however that in the past four or five years he has not been as aggressive as he had prior to that time.

He reflects an unstable job history stating that when he was eighteen he left home to come South for fruit picking and once he arrived in Florida he held odd jobs such as working at a sawmill, plumbers helper, as well as the fruit picking business. His long range goals, if ever released to the free world again are to obtain a job as a plumbers helper, get married and raise a family.

RECOMMENDATIONS:

Meeks' institutional adjustment will most likely be determined by those peers whom he associates with. Meeks is the type of individual who can easily be led into practically any type of activity and therefore, in light of the milieu at Florida State Prison, aggressive behaviors could certainly not be ruled out. His prognosis remains guarded.

J. L. Anderson
 J. A. Anderson, M. S.,
 Psychologist

CONFIDENTIAL
 FOR PROFESSIONAL USE ONLY

JAA:gp

Psychologist - General (AMC)

SID J. WHITE, CLERK
PREMIER COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE 32304

Ronald B. Jones, Deputy Director-3/30/76
Dept. of Offender Rehabilitation
1311 Winewood Blvd.
Tallahassee, Florida 32301

RE: DOUGLAS R. MEEKS
VS.
STATE OF FLORIDA

CASE NO. 47,533

Dear Sir:

I have this date received the below-listed pleadings or documents:

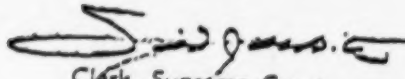
Psychological Screening Report

RECEIVED

INMATE TREATMENT

Please make reference to the case number in all correspondence and pleadings.

Most cordially,


Clerk, Supreme Court

SJW/tsc

STYLE: Huckaby vs. State.

CASE NO.: 47,736

DATE 3-25-76

RECEIPT IS ACKNOWLEDGED OF:

☒ Psychological Report

- ☐ BRIEF
- ☐ CONFORMED TRANSCRIPT
- ☐ REQUEST FOR ORAL ARGUMENT
- ☐ PETITION FOR ATTORNEY'S FEES
- ☐ PETITION FOR REHEARING
- ☐ ORIGINAL RECORD/EXHIBITS
- ☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
- ☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF _____

RESPONSE TO _____

COPY OF _____

SID J. WHITE, Clerk
Supreme Court of Florida

047571 Ben
044574 Flynn

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1976
WEDNESDAY, APRIL 14, 1976

FRANZ PETER BUCKREM,
Appellant,

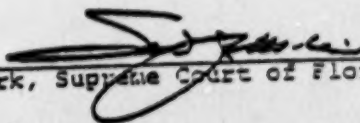
vs.

STATE OF FLORIDA,
Appellee.

182018
CASE NO. 48,029

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 14th day of April, 1976.


Clerk, Supreme Court of Florida

Honorable Paul M. Murchek
Honorable Gale K. Greene
Honorable Raymond L. Marky

STYLE Franz Peter Buckrem vs. State

CASE NO. 48,029

DATE 4-19-76

RECEIPT IS ACKNOWLEDGED OF:

XXXXXX Pre-Sentence Investigation

182018
BRIEF
CONFORMED TRANSCRIPT
REQUEST FOR ORAL ARGUMENT
PETITION FOR ATTORNEY'S FEES
PETITION FOR REHEARING
ORIGINAL RECORD/EXHIBITS
PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF _____

RESPONSE TO _____

COFF OF _____

SID J. WHITE, Clerk
Supreme Court of Florida

April 16, 1976

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

RE: Franz Peter Buckram
vs.
State of Florida
Case No. 48,029

Dear Mr. White:

Pursuant to the order of the court dated April 14, 1976,
please find attached a copy of the pre-sentence investigation
conducted in the case of the above-named.

If I can be of any further assistance to the court, please
advise.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

HTD:kb

Enc.

STYL: Franz Peter Buckram vs. State *File*
CASE NO. 48,029 DATE 4-15-76
RECEIPT IS ACKNOWLEDGED OF:
XXXX Psychological report *049061*
BRIEF
CONFORMED TRANSCRIPT
REQUEST FOR ORAL ARGUMENT
PETITION FOR ATTORNEY'S FEES
PETITION FOR REHEARING
ORIGINAL RECORD/EXHIBITS
PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON
LETTER OF _____
RESPONSE TO _____
COPY OF _____

SID J. WHITE, Clerk
Supreme Court of Florida



LOUIE L. WAINWRIGHT, SECRETARY

DEPARTMENT OF OFFENDER REHABILITATION

1311 Winwood Boulevard • Tallahassee, Florida 32301 • Telephone: 904-483-1021

7

Honorable Sid J. White
Clark, Supreme Court
Supreme Court Building
Tallahassee, Fl. 32304

RE: Franz Peter Buckram 049061

In response to your telephone request of this date, please find enclosed a copy of our psychological report on Mr. Buckram.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

C. E. Stencil

Mr. C. E. Stencil
Inmate Records Supervisor

Enclosure

DOCUMENTATION OF TELEPHONE CONTACT

DATE:

CALLED:

CALLED BY:

*July, Office/Cen
Supreme Ct.*

DISTRICT:

SUBOFFICE:

RE:

Clem Stone Chambers

CO#:

488-0125

SUMMARY OF CONVERSATION:

{ 7/11/75 Sarason }

wrote OSI - w/sent order

--

J. Burleson

4
IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1976
TUESDAY, MAY 11, 1976

153852

GLEN STARK CHAMBERS, *
Appellant, *
vs. *
STATE OF FLORIDA, *
Appellee. *

CASE NO. 47,888

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation (CO#153852) in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 11th day of May, 1976.


Clerk of the Supreme Court of Florida.

May 18, 1976

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

RE: Case No. 47,888

Dear Mr. White:

Pursuant to the order of the court dated May 11, 1976,
please find attached a copy of the presentence investi-
gation conducted in this case.

If this writer can be of further assistance to the court,
please advise.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

ETD:kb

Enc.

May 18, 1976

Mr. Sid Johnston
Assistant Attorney General
Capital

RE: Glen Starke Chambers
CO#153852

Dear Mr. Johnston:

Pursuant to your telephone request of me on May 17, 1976, please find attached a copy of the presentence investigation conducted in the case of the above-named.

Another copy has been forwarded to the court pursuant to the court order dated May 11, 1976.

We would appreciate, of course, that the copy we are providing you be kept in confidence as much as possible as there is sensitive information contained in the report.

Sincerely yours,

Harry T. Dodd
Administrative Assistant

HTD:kb

Enc.

IN THE SUPREME COURT OF FLORIDA

JANUARY TERM, A. D. 1976

THURSDAY, JUNE 3, 1976

RICHARD HENRY GIBSON,
Appellant,

vs.

CASE NO. 48,698

STATE OF FLORIDA,
Appellee.

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of Said Court at Tallahassee, the Capital, on this the 3rd day of June, 1976.

/s/ Sid J. White
Clerk, Supreme Court of Florida.

Hon. Paul M. Murchek
Hon. Louis G. Carres
Hon. Jeanne Dawes Schwartz

A True Copy

TC

TEST:

By: *Bernice L. Saunders*
Sid J. White
Clerk, Supreme Court

RECEIVED
JUN 10 1976
CLERK OF SUPREME COURT
TALLAHASSEE, FLORIDA

JUN 11 1976

RECEIVED

May 12, 1977

CONFIDENTIAL

Mr. Sid White, Clerk
Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: Richard Henry Gibson
CO-152388

Dear Mr. White:

Pursuant to telephone request from your office this date, enclosed please find a copy of the Presentence Investigation concerning the above-captioned individual for your confidential information.

We were advised that you had previously requested this report, however, we were unable to locate a copy of the Order and we would appreciate a copy for our file.

May we assure you of our cooperation in these matters.

Very truly yours,

Kenneth W. Simmons
Assistant Director

KWS:lt

Enclosure

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1976
MONDAY, JUNE 7, 1976

178485 178486
ELWOOD CLARK BARCLAY and
JACOB JOHN DOUGAN, JR.,

Appellants,

vs.

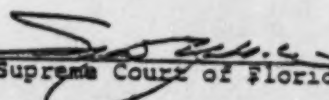
CASE NO. 47,260

STATE OF FLORIDA,

Appellee.

It is hereby ordered that the Parole and Probation
Commission transmit to the Clerk of the Supreme Court of Florida
forthwith the pre-sentence investigations (17-8485 and 17-8486)
in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the
Supreme Court of Florida, and the Seal of said Court at Tallahassee,
the Capital, on this the 7th day of June, 1976.


Clerk, Supreme Court of Florida

Hon. Paul M. Murchek
Hon. Ernest D. Jackson, Sr.
Hon. Wallace E. Allbritton

File copy

June 11, 1976

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

RE: Elwood Clark Barclay, CO#178485
Jacob John Dougan, Jr., CO#178486

Dear Mr. White:

As per the Supreme Court's order of January 7, 1976, please find attached presentence investigations on the above-referenced subjects.

If we may be of further service to you, please do not hesitate to contact us.

Sincerely yours,

Kenneth W. Simmons
Assistant Director

KWS:B:kb

Enc.

046621

SID J. WHITE, CLERK
SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE 32304

File

DEPARTMENT OF OFFENDER REHAB
1311 Winewood Blvd.
Tallahassee, Florida 32301

June 8, 1976

RE: Psychological Screening Reports

Dear Sir:

I have this date received the below-listed pleadings or documents:

Psychological Screening Report in Elwood Barclay and Jacob John Dougan
vs. State

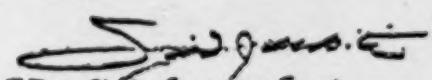
046621

046622

Psychological Screening Report in Monroe Holmes vs. State

Please make reference to the case number in all correspondence and pleadings.

Most cordially,


Clerk, Supreme Court

SJW/jdw

SID J. WHITE
SUPREME CLERK
SUPREME COURT
TALLAHASSEE

IN THE SUPREME COURT OF FLORIDA
JANUARY TERM, A. D. 1976
MONDAY, JUNE 7, 1976

178485 178486 *DS*

ELWOOD CLARK BARCLAY and
JACOB JOHN DOUGAN, JR.,

Appellants,

vs.

CASE NO. 47,260

STATE OF FLORIDA,

Appellee.

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigations (17-8485 and 17-8486) in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 7th day of June, 1976.

[Signature]
Clerk, Supreme Court of Florida

Hon. Paul M. Murchek
Hon. Ernest D. Jackson, Sr.
Hon. Wallace E. Allbritton

June 11, 1976

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

RE: Elwood Clark Barclay, CO#178485
Jacob John Dougan, Jr., CO#178486

Dear Mr. White:

As per the Supreme Court's order of January 7, 1976, please find attached presentence investigations on the above-referenced subjects.

If we may be of further service to you, please do not hesitate to contact us.

Sincerely yours,

Kenneth W. Simmons
-- Assistant Director

KWS:B:kb

Enc.



SIO J. WHITE, CLERK
SUPREME COURT OF FLORIDA
SUPREME COURT BUILDING
TALLAHASSEE 32304

File

DEPARTMENT OF OFFENDER REHAB
1311 Winewood Blvd.
Tallahassee, Florida 32301

June 8, 1976

046622

RE: Psychological Screening Reports

Dear Sir:

I have this date received the below-listed pleadings or documents:

Psychological Screening Report in Elwood Barclay and Jacob John Dougan
vs. State ⁰⁴⁶⁶²¹ ⁰⁴⁶⁶²²

Psychological Screening Report in Monroe Holmes vs. State

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

Sio J. White
Clerk, Supreme Court

STW/jdw

44



SIO J. WHITE, CLERK

SUPREME COURT OF FLORIDA

SUPREME COURT BUILDING

TALLAHASSEE 32304



File

DEPARTMENT OF OFFENDER REHAB
1311 Winewood Blvd.
Tallahassee, Florida 32301

June 8, 1976

046622

RE: Psychological Screening Reports

Dear Sir:

I have this date received the below-listed pleadings or documents:

Psychological Screening Report in Elwood Barclay and Jacob John Dougan
vs. State

046621

046622

Psychological Screening Report in Monroe Holmes vs. State

Please make reference to the case number in all correspondence and pleadings.

Most cordially,

S. J. White
Clark, Supreme Court

SJW/jdw

45

1-25

Include
check this

for PSI

January 21, 1977

Honorable Sid J. White
Clark, Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

Dear Mr. White:

RE: MARK MIKENAS
vs.
STATE OF FLORIDA

CASE NO. 49,928

Reference is made to your letter of January 17, 1977, in response to my motion for copy of presentence investigation report. In response to my motion, your letter says, "Moot, none prepared".

I am not urging the Court to consider the presentence investigation report, but I do note that it was on its own initiative, that the Court ordered the Parole and Probation Commission to produce the report. Thus, as an officer of the Court, I bring to your attention that there was, in fact, a presentence investigation report prepared in this case by an officer of the Florida Parole and Probation Office in Tampa. Indeed, in making his Findings of Fact, the trial judge considered the presentence investigation (Record, page 75, paragraph one).

If the report is transmitted to you as ordered by the Court, I request that consideration be given to my motion for a copy of the report.

Sincerely,

Robert W. Knight

RWK:rk

cc: Honorable Paul Murchak, Director,
Florida Parole and Probation Commission

Raymond L. Marky, Assistant Attorney General

46

February 14, 1977

Mr. Sid White
Clerk of the Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: MIXENAS, Mark CO# 194081
Case No. 49,922

Dear Mr. White:

Please refer to your request of January 24, 1977. We have now checked with the Tampa Office of the Department of Offender Rehabilitation and have learned that a presentence investigation was prepared in this case however, was never sent to us.

I am enclosing a copy of this investigation for your use and if we can be of further assistance to the court please do not hesitate to contact us.

Sincerely,

Kenneth W. Simmons
Assistant Director

KWS/B/pc

IN THE SUPREME COURT OF FLORIDA
THURSDAY, FEBRUARY 17, 1977

RODNEY WAYNE MALLOY,
Appellant,
vs.
STATE OF FLORIDA,
Appellee.

CASE NO. 49,580

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this seventeenth day of February, 1977.


Clerk of the Supreme Court of Florida

TC
cc: Honorable Paul Murchek
Attn.: Judy Burleson
Paul J. Martin, Esquire
Raymond L. Marky, Esquire

FILED
FEB 20 1977
CLERK OF THE SUPREME COURT
TALLAHASSEE, FLORIDA

Supreme Court of Florida
Tallahassee 32304

SID J. WHITE
CLERK
BERRICE L. SAUNDERS
CHIEF DEPUTY CLERK

February 17, 1977

TELEPHONE:
Tallahassee, Florida
904-452-3143

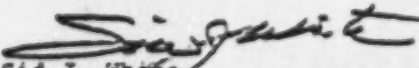
Mr. Ed Stancil, Director
Department of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

RE: RODNEY WAYNE MALLOY vs. STATE OF FLORIDA
Case No. 49,580

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on
death row.

Most cordially,


Sid J. White
Clerk, Supreme Court

SJW/tsc

2-21

February 22, 1977

Mr. Sid J. White
Clerk, Supreme Court
Tallahassee, Florida 32304

Re Rodney Wayne Malloy

036/08

Dear Mr. White

Your recent letter to Ed Stancil in which you requested a copy of the latest Psychiatric Evaluation on Inmate Malloy has been forwarded to my office for further attention. I, in turn, am making your letter available to the staff at the Florida State Prison where Inmate Malloy is located. I am confident that if any psychiatric documents are available they will make them available to your office.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Phillip J. Walsh
Coordinator of Classification Services

PJW/jlb

cc Mr. Tom Bigham, Classification Supervisor
Florida State Prison
w/enclosure

February 24, 1977

The Honorable Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

RE: MALLOY, Rodney Wayne
Case No. 49-580

Dear Mr. White:

Pursuant to the court's order of February 17, 1977, the Commission has conducted a search of the record in the case of the above-named. No presentence investigation report can be located regarding the conviction under appeal.

A check with the former Commission District Office in Bartow, Florida also fails to reveal that a presentence investigation was conducted in the case.

If the Commission can be of further assistance, please advise.

Sincerely,

Kenneth W. Simmons
Assistant Director

KWS/ED/pc

Free
former

160437

STYLE RODNEY WAYNE MALLOY vs. STATE
CASE NO. 49,580 DATE 2/28/77
RECEIPT IS ACKNOWLEDGED OF:
☐ BRIEF
☐ CONFORMED TRANSCRIPT
☐ REQUEST FOR ORAL ARGUMENT
☐ PETITION FOR ATTORNEY'S FEES
☐ PETITION FOR REHEARING
☐ ORIGINAL RECORD/EXHIBITS
☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON
LETTER OF February 24, 1977
RESPONSE TO _____
COPY OF _____

SID J. WHITE, Clerk
Supreme Court of Florida

STYLE RODNEY WAYNE MALLOY vs. STATE
CASE NO. 580 A036/CP DATE 2/25/77
RECEIPT IS ACKNOWLEDGED OF:
☐ BRIEF
☐ CONFORMED TRANSCRIPT
☐ REQUEST FOR ORAL ARGUMENT
☐ PETITION FOR ATTORNEY'S FEES
☐ PETITION FOR REHEARING
☐ ORIGINAL RECORD/EXHIBITS
☐ PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS
☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON
LETTER OF February 22, 1977
RESPONSE TO _____
COPY OF _____

SID J. WHITE, Clerk
Supreme Court of Florida

Kws
Death Box

178289

JESSE RAYMOND RUTLEDGE,
Appellant,

vs.

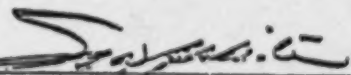
CASE NO. 48,801

STATE OF FLORIDA,

Appellee.

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 21st day of April, 1977.


Clerk of the Supreme Court of Florida

R

CC: Hon. Paul M. Murchek
Attn.: Judy Burleson
Hon. Peter F. Laird
Hon. Wallace E. Allbritton

RECEIVED
JUN 26 8 07 AM '77
FLORIDA PROBATION AND
PAROLE COMMISSION
TALLAHASSEE, FLORIDA

April 21, 1977


Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Jesse Raymond Rutledge
vs.
State of Florida
Case No. 48,801

Dear Mr. Stancil:

This is to request a copy of the latest
psychiatric evaluation made on the above named inmate who
is on death row.

Most cordially,


Sid J. White
Clerk, Supreme Court

SJW:elr

May 5, 1977

Honorable Sid White
Clerk, Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Jessie Raymond Rutledge, CO# 178299

Dear Clerk White:

Please refer to your order dated April 21, 1977, in reference to the above individual. Please be advised that our records reflect that the individual was sentenced on December 31, 1975, in the circuit of Alachua County to death. We do not have a pre-sentence investigation in this case and a check with the Department of Offender Rehabilitation's District Office in Gainesville reflects that there was not a pre-sentence investigation done in this case.

If we can be of any other assistance, please advise.

Sincerely,

Kenneth W. Simmons
Assistant Director

KWS:lh

DOCUMENTATION OF TELEPHONE CONTACT

DATE: 4/25/77

CALLED:
CALLED BY:

DISTRICT: 11-7532
SUBOFFICE:

RE: FRED LYMAN BRUMBLEY

CO#: 165106

SUMMARY OF CONVERSATION:

SUBJECT IS ONE OF THOSE CASES WHERE LOOSE MAIL WAS BEING HELD IN RECORDS INSTEAD OF BEING PUT WITH FILE.

SUBJECT WAS NOT SCHEDULED FOR FINAL REV. HRG. BECAUSE WE DID NOT KNOW ABOUT DISPOSITION. UNTIL 4/19/77.

SUBJECT WILL NOW BE SET UP FOR A REV. HRG.

[Signature]

IN THE SUPREME COURT OF FLORIDA
THURSDAY, SEPTEMBER 13, 1979

FRED LYMAN BRUMBLEY,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

** **

**

**

**

CASE NO. 56,006

**

**

It is hereby ordered that the Division of Corrections
transmit to the Clerk of the Supreme Court of Florida forthwith
the pre-sentence investigation in this cause.

A True Copy

TEST:


Sid J. White
Clerk, Supreme Court

H
cc: Hon. Louie Wainwright
Carl S. McGinnes, Esquire
Richard W. Prospect, Esquire

SEP 21 0 21 PM '79

September 19, 1979

Honorable Sid J. White
Clark, Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

Re: Fred Lyman Brumley, #038346

Dear Mr. White:

Pursuant to your court order dated September 13, 1979, attached you will find a copy of the pre-sentence investigations on the above referenced subject.

If we may be of further assistance, please advise.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Louis E. Carmichael
Chief, Bureau of Offender Records

LHC/eb

Attachments



DEPARTMENT OF OFFENDER REHABILITATION

REGION II

COMMUNITY SERVICES DISTRICT-24

Post Office Box 540

Perry, Florida 32347

Telephone: 904-384-3410

September 26, 1979

Mr. D. H. Brierton
Superintendent
Florida State Prison
P. O. Box 747
Starke, Florida 32091

Attention: Mr. Tom Bigham, Jr.
Classification Supervisor II

Re: Brumbley, Fred
Number: 38846

Dear Mr. Brierton:

Please be advised that we do not have a file on the above subject, and a Presentence Investigation was not requested by the Court at the time of sentencing.

Sincerely,

R. K. Isbell
Robert K. Isbell
District Supervisor

RKI:ph

CHS
512-77

IN THE SUPREME COURT OF FLORIDA
WEDNESDAY, MAY 11, 1977

2

JOSEPH GREEN BROWN, *
 *
 Appellant, *
 *
vs. *
 *
STATE OF FLORIDA, *
 *
 Appellee. *
* * * * *

CASE NO. 46,925

It is hereby ordered that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

WITNESS the Honorable Ben F. Overton, Chief Justice of the Supreme Court of Florida, and the Seal of said Court at Tallahassee, the Capital, on this the 11th day of May, 1977.

Bernice L. Saunders
Chief Deputy Clerk, Supreme Court of Fla.

W
CC: Honorable Paul M. Murchek
 Attn.: Carolyn Snurkowski
 Honorable J. Michael Shea
 Hon. Charles W. Musgrove

ATTENTION *Teresa*
Supreme Court of Florida

SID J. WHITE
CLERK
BERNICE L. SAUNDERS
CHIEF DEPUTY CLERK

Tallahassee 32304

May 11, 1977

TELEPHONE:
904-442-8130

Mr. Ed Stancil, Director
Department of Offender Rehabilitation
1311 Winewood Blvd.
Tallahassee, Florida 32301

042546

RE: Joseph Green Brown v. State of Florida
Case No. 46,925

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on death row.

Most cordially

Bernice L. Saunders

Bernice L. Saunders
Chief Deputy Clerk, Supreme Court

BLS/jdw

sent reports 5-13-77

lk.

May 16, 1977

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida

Re: Joseph Green Brown
CNS 172407
PR# 042546

Pursuant to the Court's Order of May 11, 1977, in case #46-925, the Commission has conducted a search of its records to determine if a pre-sentence investigation was conducted.

The Commission's records do not reflect that a pre-sentence investigation was conducted in Hillsborough County Circuit Court, case #73-2130-C. The Commission did conduct a pre-sentence investigation in Hillsborough County Circuit Court, case #73-1333-C, which charged Robbery and was not related to First Degree Murder.

If this Commission can be of further assistance to the Court, please advise.

Sincerely,

Harry T. Dodd
Parole Agent Supervisor

HTD/ca.

August 4, 1977

Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Robert Fieldmore Lewis
vs.
State of Florida
Case No. 50,851

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on death row.

Most cordially,

Sid J. White
Clerk, Supreme Court

By: *Emily L. Rhoads*
Deputy Clerk

SJW:elr

63



DEPARTMENT OF OFFENDER REHABILITATION

1311 Winwood Boulevard • Tallahassee, Florida 32301 • Telephone: 904-488-5021

FLORIDA STATE PRISON

Post Office Box 747 • Starke, Florida 32091 • Telephone: 904-964-8125

August 22, 1977

Mr. Edward Alford
Inmate Records Supervisor
Department of Offender Rehabilitation
1311 Winwood Blvd.
Tallahassee, Florida 32301

RE: Lewis, Robert #A-032695

Dear Mr. Alford:

In response to your requested evaluation of the above named subject has been currently suspended. Upon receiving a phone call from the subject's counselor, Mr. Ted Mack, Assistant Public Defender, Tallahassee, Florida, and subsequent to three consecutive refusals of appointment by the subject this action is necessary.

Mr. Mack advised his client not to submit to evaluation by this or any other office in Florida State Prison. Mr. Mack informed me of this advice this date.

If I can be of any further help, please do not hesitate to call.

Sincerely,

D. H. BRIERTON, SUPERINTENDENT

Paul C. Decker

Paul C. Decker
Psychologist

PCD:lr

cc: File

64

file

August 24, 1977

Mr. Ted Mack
Assistant Public Defender
P. O. Box 671
Tallahassee, Florida 32302

RE: Robert Fieldmare Lewis, #032695

Dear Mr. Mack:

Enclosed is a copy of the letter from Mr. Sid J. White, Clerk, Supreme Court of Florida in which the court has requested a copy of the latest psychiatric evaluation on Mr. Lewis.

Please be assured of our cooperation in such matters.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carnichael, Chief
Bureau of Offender Records

LHC/eas

Enclosure

65

August 26, 1977

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

RE: Robert Fieldmore Lewis, #A032695
VS. State of Florida, Case #50,851

Dear Mr. White:

This is in response to your request for a copy of the Psychiatric evaluation on the above named subject.

I am sorry not to have responded to your request sooner, but complications has arisen concerning this request.

Upon reviewing Mr. Lewis' Institutional File, it was learned that no recent Psychiatric Evaluation was available so an appointment was scheduled for an evaluation to be completed. Mr. Lewis, after consulting with his legal council, has refused to cooperate in the preparation of this evaluation.

Upon his receipt into our custody, a Psychological Screening Report was prepared on Mr. Lewis. Our Institutional Psychologist is preparing a review and up-date to this report which will be forwarded to your office as soon as it is completed. Meanwhile, I am attaching a copy of the original report for your use.

I trust this information will be of use to you. If we can further assist in this case, please advise.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carmichael, Chief
Bureau of Offender Records

LHC/eas

Attachment

66

September 7, 1977

Mr. Sid J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

Re: Lewis, Robert Fieldmore, #A032695

Dear Mr. White:

In follow-up to your request for a copy of the above named inmate's psychiatric evaluation, I am forwarding the latest correspondence from the Institutional Psychologist which is self-explanatory.

If I may be of further assistance in this matter, please advise.

Sincerely,

LOUIE L. MINNRIGHT, SECRETARY

Louis H. Carmichael
Chief, Bureau of Offender Records

LHC/eag

67

Louis N. Carmichael
Chief, Bureau of
Offender Records
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

September 8, 1977

Robert Fieldmore Lewis,
vs.
State of Florida

Case No. 50,851

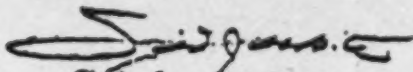
Dear Sir:

I have this date received the below-listed pleadings or documents:

Your letter of September 7, 1977, with copy of Paul C. Decker's
letter of August 22, 1977, to Edward Alford.

Please make reference to the case number in all correspondence and pleadings.

Most cordially,


Clerk, Supreme Court

SJW:elr

SID J. WHITE
CLERK
BERNICE L. BAUNDERS
CHIEF DEPUTY CLERK

Tallahassee 32301

October 5, 1977

TELEPHONE:
Tallahassee, FL 32301
904 - 499-0123

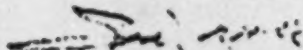
Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Jesse Lamar Hall, vs.
State of Florida
Case Nos. 49,566 & 49,567

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on death row.

Most cordially,


Sid J. White
Clerk, Supreme Court

SJW:elr

69

October 24, 1974

Sid L. White
Clerk, Supreme Court of Florida
Tallahassee, Florida 32304

Re: Jesse Lamar Hall, vs. State of Florida
Case Nos. 49,566 & 49,567
DOR #033055

Dear Mr. White:

This is in response to your request for a copy of the latest
Psychiatric Evaluation on the above referenced inmate.

No Psychiatric Evaluation has been completed on Mr. Hall, how-
ever, I am enclosing a copy of the Psychological screening re-
port prepared when he was admitted to our custody.

I trust this information will sufficiently meet your needs in
this case.

Sincerely,

LOUIE L. BATHRIGHT, SECRETARY

E.L. Alford
Acting Inmate Records Supervisor

ELA:sp

Enclosure

Best Copy Available

STYLE: 1-19-1980 Hall vs. State of Florida

CASE NO. 19,566 & 19,567 DATE: 10-27-1977

RECEIPT IS ACKNOWLEDGED OF: (DOR #053055)

File

0000000000

BRIEF

CONFORMED TRANSCRIPT

REQUEST FOR ORAL ARGUMENT

PETITION FOR ATTORNEY'S FEES

PETITION FOR REHEARING

ORIGINAL RECORD/EXHIBITS

PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS

ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF October 24, 1977, with Psychological

RESPONSE TO Screening Report.

COPIES OF _____

SID J. WHITE, Clerk
Supreme Court of Florida

Supreme Court of Florida

Tallahassee 32301

SID J. WHITE
CLERK
SERVING L. SAUNDERS
CHIEF DEPUTY CLERK

October 5, 1977

TELEPHONE:
904 - 490-0123

Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Enoch Lewis, Jr., vs. State of Florida
Case No. 49,668

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on death row.

Most cordially,


Sid J. White
Clerk, Supreme Court

SJW:elr

October 24, 1977

Sid J. White
Clerk, Supreme Court of Florida
Tallahassee, Florida 32304

Re: Enoch Lewis, Jr. vs. State of Florida
Case No. 49668
DOR #053056

Dear Mr. White:

This is in response to your request for a copy of the latest
Psychiatric Evaluation on the above referenced individual.

No Psychiatric Evaluation has been completed on Mr. Lewis,
however, I am enclosing a copy of the psychological screening
report prepared when he was admitted to our custody.

I trust this information will sufficiently meet your need in
this case.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

E.L. Alford
Acting Inmate Records Supervisor

ELA:sp

Enclosure

Best Copy Available

Supreme Court of Florida

Tallahassee 32304

SIG J. WHITE
CLERK
SERVING L. SAUNDERS
CHIEF DEPUTY CLERK

October 5, 1977

TELEPHONE
FAX
1-800-455-1111

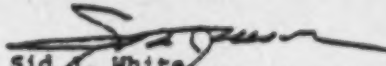
Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Harold Gene Lucas, vs.
State of Florida
Case No. 51,135

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on death row.

Most cordially,


Sid J. White
Clerk Supreme Court

SJW:elr

October 24, 1977

Sid J. White
Clerk, Supreme Court
Tallahassee, Florida 32304

Re: Harold Gene Lucas, vs. State of Florida
Case No. 51,135
DOR #054279

Dear Mr. White:

This is in response to your request for a copy of the latest
Psychiatric Evaluation on the above referenced inmate.

No Psychiatric Evaluation has been completed on Mr. Lucas.
However, I am enclosing a copy of the psychological screening
report prepared when he was admitted to our custody.

I trust this information will sufficiently meet your need in
this case.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

E.L. Alford
Acting Inmate Records Supervisor

ELAtsp

Enclosure

BAD COPY

Supreme Court of Florida
Tallahassee 32301

SID J. WHITE
CLERK
SERGEANT L. SAUNDERS
CHIEF DEPUTY CLERK

TELEPHONE
904-634-1123

October 25, 1977

Mr. Ed Stancil, Director
Department of Offender Rehabilitation
1311 Winwood Blvd.
Tallahassee, Florida 32301

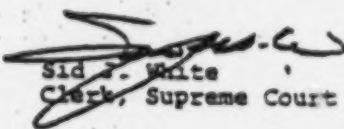
056787

RE: Derrick MO'Ney Manning vs. State of Florida
Case No. 51,098

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on death row.

Most cordially,


Sid J. White
Clerk, Supreme Court

SJW/slw

RECEIVED
NOV 02 1977

SUPERINTENDENT'S OFFICE

RECEIVED
NOV 20 1977

DEPT. OF CORRECTIONS
TALLAHASSEE, FLORIDA

November 18, 1977

Mr. Sid J. White
Clark, Supreme Court
Supreme Court of Florida
Tallahassee, Florida 32304

Re: Derrick Mc'Ney Manning vs. State of Florida
Case # 31,098 CUR# 0056787

Dear Mr. White:

Pursuant to your request of October 25, 1977, I am enclosing a copy of
psychiatric evaluation prepared on the above referenced inmate.

Please be assured of our cooperation in such matters.

Sincerely,

LOUIE L. WALDWRIGHT, SECRETARY

E. L. Alford
Acting Inmate Records Supervisor

EJA/bdg

Attachment

Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
GERNIE L. SAUNDERS
CHIEF DEPUTY CLERK

November 23, 1977

TELEPHONE
TALLAHASSEE, FLORIDA
904-644-1122

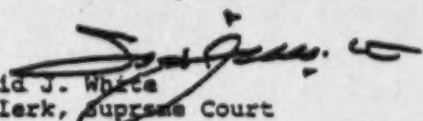
Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winwood Boulevard
Tallahassee, Florida 32301

Re: Arthur F. Goode, III
vs. State of Florida
Case No. 51,480

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on death row.

Most cordially,


Sid J. White
Clerk, Supreme Court

SJW:elr

78

December 7, 1977

Mr. J. J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

RE: COON, ARTHUR P. #056781

Dear Mr. White:

Your recent letter to SA Stancil has been forwarded to my office for attention. Enclosed you will find copies of the psychological screening report and psychiatric contact note on the above named inmate. Pursuant to your request, I am forwarding this information to your office. Please be advised that these are the only psychiatric reports we have on file at the present time.

If I can be of further assistance in this matter, feel free to contact my office at any time.

Sincerely,

LOUIS L. MADWRIGHT, SECRETARY

E.A. Sobach
Acting Inmate Records Supervisor

EKS:sp

Enclosure

January 20, 1978

Mr. Sid White
Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida

Re: Carl Ray Sougar
Case # 52-642
FD# 041036
CD# 169436

Dear Mr. White:

This is in reference to your communication of December 21, 1977, with reference to the above captioned individual, wherein you asked for a copy of the pre-sentence investigation in this case.

Be advised that no pre-sentence investigation was ever completed on this case, however, a post sentence investigation was completed and I am enclosing this and hope that it will be of use to you in this matter.

Very truly yours,

Kenneth W. Simmons
Deputy Director

KWS/Scs

enclosure: post sentence investigation

Supreme Court of Florida

Tallahassee 32301

SID A. WHITE
CLERK
BERNICE L. BILGIN
CHIEF DEPUTY CLERK

May 9, 1978

TELEPHONE:
904-488-0123

Honorable Kenneth W. Simmons
Deputy Director
Florida Parole and Probation Commission
P. O. Box 3168
Tallahassee, Florida 32303

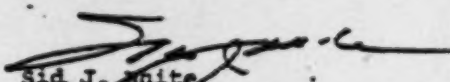
Re: Carl Ray Songer vs. State of Florida
Supreme Court Case No. 52,642

Dear Mr. Simmons:

At the direction of the Court, the post-sentence investigation is returned herewith. We should not have anything in the Court file that was done subsequent to the sentencing.

Thank you for your kind cooperation.

Most cordially,


Sid J. White
Clerk Supreme Court.

SJW:sg
Enclosure

January 23, 1978

033647

Shl J. White, Clerk
Supreme Court of Florida
Tallahassee, Florida 32304

Re: Thomas, Daniel M.
#84923647

Dear Mr. White:

I have received your recent correspondence requesting the latest psychiatric evaluation made on the above referred individual who is presently on Death Row. I have checked our files here in Central Office and it appears that his latest admission summary has not been received here in Tallahassee to date. Therefore, I have requested the institution to forward a copy of the latest psychiatric information directly to you and have been assured that it will go out in the mail this day.

We are assuring you of all cooperation in these matters.

Sincerely,

LOUIE L. KAINWRIGHT, SECRETARY

E.A. Sobush
Acting Inmate Records Supervisor

EAS/pr

Supreme Court of Florida

Tallahassee 32301

SID J. WHITE
CLERK
SERVING L. BRIDGES
CHIEF CLERK

January 31, 1978

4
TELEPHONE
904-488-0123

1354
Mr. Ed Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Jon Steven Miller a/k/a.
Robert Christopher, vs.
State of Florida
Case No. 50,606

Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on death row.

Most cordially,


Sid J. White
Clerk, Supreme Court

SJW:elr

February 2, 1978

Mr. Sid White
Clerk
Supreme Court Building
Tallahassee, Florida

Re: Jon Steven Miller AKA Robert Christopher
PR# 041384, CO# 170151

Dear Mr. White:

Please find attached a post sentence investigation which was
done on the above captioned individual.

I hope this will be of help to you in this matter. If further
information is needed, please do not ~~hesitate~~ contact this
office. ~~hesitate~~

Sincerely,

Kenneth W. Simmons
Deputy Director

KWS/Sea

Best Copy Available

February 5, 1978

Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304

RE: Jon Steven Miller #041354

Dear Mr. White:

Enclosed is the latest psychiatric evaluation completed on the above referenced individual which you requested that I forward to your attention. Additionally, I have requested that the institution forward a copy of the psychological follow-up completed on Mr. Miller on December 27, 1978. Please be advised that this is the latest psychiatric information which we have available in our files.

Assuring you of our continued cooperation in these matters.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

E.A. Sobach, Acting Inmate Records Supervisor

Enclosed is a copy of the psychiatric follow-up on MILLER, Jon #041354. This was forwarded to Mr. Sid J. White at the Supreme Court Building.

Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
SERVING L. SMILGINS
CHIEF DEPUTY CLERK

February 10, 1978

TELEPHONE:
904-483-0133

4

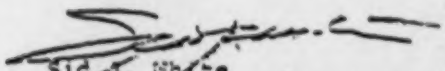
Mr. Ed. Stancil, Director
Dept. of Offender Rehabilitation
1311 Winewood Boulevard
Tallahassee, Florida 32301

Re: Bobby Marion Francis,
vs. State of Florida
Case No. 50,127

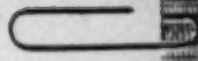
Dear Mr. Stancil:

This is to request a copy of the latest psychiatric
evaluation made on the above named inmate who is on death row.

Most cordially,


Sid J. White
Clerk Supreme Court

SJW:elr



RECEIVED

AUG 27 1980

PUBLIC DEFENDER
2nd JUDICIAL CIRCUIT

February 16, 1973

Ed J. White, Clerk
Supreme Court Building
Office of the Clerk
Supreme Court of Florida
Tallahassee, Fla. 32304

Re: Francis, Johnny Martin 73-377057 Case #32-117

Dear Mr. White:

Enclosed is the latest psychiatric report available on the above referenced individual. Because there is not a more recent evaluation available, I have requested the staff at Florida State Prison to complete an updated psychological evaluation and forward it to my office. This report should be available in the very near future.

Assuring you of our continued cooperation in these matters.

Sincerely,

LOUIE L. MARGARET, SECRETARY

H.A. Sobach, Acting Inmate Records Supervisor

Enclosure

EAS/pf

STYLE BOBBY MARION FRANCIS vs. STATE OF FLORIDA
CASE NO. 50,127 DATE 2-23-78

RECEIPT IS ACKNOWLEDGED OF:

Psychological Evaluation

BRIEF

CONFORMED TRANSCRIPT

REQUEST FOR ORAL ARGUMENT

PETITION FOR ATTORNEY'S FEES

PETITION FOR REHEARING

ORIGINAL RECORD/EXHIBITS

PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS

ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF

RESPONSE TO

- COPY OF

SID J. WHITE, Clerk
Supreme Court of Florida

1-0796 3-10-78
VALUING & CROCKERY
APR 12 8 00 1978
REV. J. H. HARRIS
CLERK, U.S. DIST. CT.
ACT. 11, ALABAMA
RECEIVED IN OFFICE
E. L. HARRIS - SECRETARY
DEPARTMENT OF OFFICIAL
REHABILITATION

FLORIDA PAROLE AND PROBATION COMMISSION FEB 22 1978

P.O. BOX 2168 1117 THOMASVILLE ROAD
TALLAHASSEE, FLORIDA 32303

1200
FLORIDA SUPREME COURT

February 20, 1978

55-127

Mr. Sid White
Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32303

Re: Bobby Marion Francis
Case #50-127
PR# 8-009959

Dear Mr. White:

This is in reference to your request of February 10, 1978, wherein you asked for a copy of the presentence investigation in this cause.

Be advised that this subject had no presentence investigation conducted prior to his sentencing from Monroe County Circuit Court for Murder in The First Degree, however in checking the case file material, I found an old Post-sentence investigation that was conducted on this individual in 1964 and also a copy of a Federal Presentence investigation conducted on this subject during January, 1972, and I am enclosing copies of these documents which I trust will help you in your investigation in this case.

If we can be of any further assistance, please do not hesitate to contact our office.

Sincerely,

Kenneth W. Simmons

Kenneth W. Simmons
Deputy Director

KWS/Sca

IN THE SUPREME COURT OF FLORIDA

PAUL EDWARD MAGILL, :
Appellant, :
v. :
STATE OF FLORIDA, :
Appellee. :
_____:

CASE NO. 51,699

MOTION TO INSPECT AND COPY
PSYCHOLOGICAL SCREENING REPORT AND
PRESENTENCE INVESTIGATION REPORT

Appellant, PAUL EDWARD MAGILL, requests this Honorable Court to enter an order authorizing appellant's counsel to inspect the appellant's presentence investigation report and appellant's Psychological Screening Report, which are before this Court pursuant to its order of May 15, 1978, and in support of said motion would state:

1. During oral argument in this cause on June 21, 1978, Chief Justice Overton referred to the contents of a Psychological Screening Report on appellant prepared by the Department of Offender Rehabilitation, which was appended to the Court's copy of the presentence investigation report. This document is before this Court and bears upon its consideration of the presence of mitigating circumstances in appellant's case. Neither appellant nor his undersigned counsel have been furnished with a copy of that report. After oral argument, undersigned counsel requested that the Clerk's Office provide her with a copy of that report, but the Chief Deputy Clerk, Bernice Smilgin, declined to do so without order of this Court. Appellant submits that the considerations of Gardner v. Florida, 51 L.Ed.2d 393 (1977) require that appellant's counsel be provided with a copy of this Psychological Screening Report.

2. Appellant also requests this Court to enter an order authorizing appellant's undersigned counsel to inspect and copy

all portions of the appellant's presentence investigation report, which this Court ordered included in the record of this case on May 15, 1978. Although undersigned counsel has been furnished with a copy of what purports to be the presentence investigation report in appellant's case, appellant's counsel has not had an opportunity to determine if that document is identical to what has been filed before this Court. Appellant submits that his counsel is entitled to inspect and copy all portions of all reports which have been filed under the heading of "presentence investigation report" with this Court.

WHEREFORE, appellant prays this Court to enter an order authorizing appellant's undersigned counsel to inspect and copy all portions of the appellant's presentence investigative report and the Psychological Screening Report, which have been made a part of the record on appeal in this case.

Respectfully submitted,

Margaret Good
MARGARET GOOD
Assistant Public Defender
Second Judicial Circuit
Post Office Box 671
Tallahassee, Florida

Attorney for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand to Michael Davidson, Esquire, Assistant Attorney General, The Capitol, Tallahassee, Florida, this 21 day of June, 1978.

Margaret Good
MARGARET GOOD

IN THE SUPREME COURT OF FLORIDA
FRIDAY, JUNE 23, 1978

PAUL EDWARD MAGILL,

Appellant,

vs.

CASE NO. 51,699

STATE OF FLORIDA,

Appellee.

Appellant's Motion to Inspect and Copy Psychological
Screening Report and Presentence Investigation Report is hereby
granted.

A True Copy

R

TEST:

Denise L. Smelgar

cc: Margaret Good, Esquire
Michael H. Davidson, Esquire

Chief Deputy Clerk

Sid J. White

Clerk, Supreme Court

57,649
FILED
JUN 8 1978
CLARK COUNTY

PSYCHOLOGICAL SCREENING
REPORT

DATE June 7, 1977
NAME WAGILL, Paul Edward NUMBER 059128 AGE 18 RACE Caucasian
OFFENSE First Degree Murder SENTENCE Death
TEST IQ 100-110 INTELLIGENCE Normal Range
EDUCATION: (verified: yes no) GRADE COMPLETED 12th COLLEGE --- AGE ---
REASON FOR NOT COMPLETING EDUCATION Instant Offense
ACADEMIC: Reading Level 7.5-8.5 Relative Grade 8.0
CREDIBILITY: (unverified) ---
SENTIMENTAL INTEREST Religion and Education
SOCIAL DIFFICULTIES History of Suicide, drug and alcohol abuse

PSYCHOLOGICAL OBSERVATIONS:

The subject, Paul Edward Wagill, #059128, is an eighteen year old Caucasian male currently sentenced to death for Murdering the cashier in a convenience store after Robbing and Raping her. The subject states this offense was precipitated by an argument with his mother in December of 1976. The subject reports that he is being raised by his mother after the death of his father, a retired Air Force colonel.

This is not the subject's first experience with legal troubles as he has also been charged with indecent exposure, generally occurring in public places to members of the opposite sex. It was noted that the target individuals were all of equal age.

When examined the subject was in good contact with reality, with no observable signs of a mental or thought disorder. Memory of near and distant events was clear and within normal limits. The subject admitted his guilt in this offense, but attributed it to increased pressure at home resulting in some sort of seizure as the subject described it.

Psychometrics reveal considerable signs of extremely impulsive behavior, coupled with a psychopathic-anti-social personality character. The subject shows very limited control in stressful situations. Results were negative for any form of psychosis at this testing.

RECOMMENDATIONS:

Presently, the subject does not appear to be in much stress, however, should these feelings develop the subject will quite possibly become suicidal. Precautions shall be routinely maintained by monitoring behavior for regression.

Paul C. Decker
Paul C. Decker
Psychologist

PCD:rk

cc: Department of Offender Rehabilitation
Florida Parole and Probation Commission
Inmate Master File
Department File

Supreme Court of Florida

Tallahassee 32304

SID J. WHITE
CLERK
BERNICE L. SMELGIN
CHIEF DEPUTY CLERK

June 23, 1978

TELEPHONE
904-488-0125

Margaret Good, Esquire
Assistant Public Defender
Second Judicial Circuit
P. O. Box 671
Tallahassee, FL 32302

Re: Paul Edward Magill vs. State of Florida
Supreme Court Case No. 51,699

Dear Ms. Good:

Please be advised that the Post Judgement Report
will be stricken from the above styled cause.

Thank you for your kind cooperation.

Most cordially,

Bernice L. Smelgin

CHIEF DEPUTY CLERK

Sid J. White
Clerk, Supreme Court

SJW:elr

cc: Michael H. Davidson, Esquire

BUREAU OF
OFFICE OF RECORDS

MAY 20 8 25 AM '79

Person Supervisor
IN THE SUPREME COURT OF FLORIDA
THURSDAY, MAY 17, 1979

CLYDE FOSTER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 50,393

It is hereby ordered that the Division of Corrections
transmit to the Clerk of the Supreme Court of Florida forthwith
the pre-sentence investigation in this cause.

A True Copy

TEST.

H
cc: Hon. Louie Wainwright

Sid J. White
Sid J. White
Clerk, Supreme Court

IN THE SUPREME COURT OF FLORIDA
FRIDAY, AUGUST 3, 1979

B 015110

JOHN ERROL FERGUSON
APPELLANT,

VS

CASE NUMBER 55,137
55,498

STATE OF FLORIDA

APPELLEE.

IT IS HEREBY ORDERED that the Parole and Probation Commission transmit to the Clerk of the Supreme Court of Florida forthwith the pre-sentence investigation in this cause.

1. TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BY: Richard D. McDowell
Deputy Clerk

BDM
C: Hon. Louie Wainwright

8-22-79

Re: John Errol Ferguson
B-015110

Supreme Court Clerk's office called requesting copy of PSI. No PSI has been forwarded to this office, nor is there one in the files at Florida State Prison.

The office of Parole and Probation in Miami has been contacted to forward this PSI directly to the Supreme Court, a copy to PSP, and a copy to Central Records for filing.

Also the Admission Summary for this inmate has not been completed (sentenced May 1978). This has also been requested this date from Mr. Brierton and a copy will be forwarded to the Supreme Court by me upon receipt.

Betty Little

DEPARTMENT OF OFFENDER REHABILITATION
INTEROFFICE MEMORANDUM

DATE: August 24, 1979

FROM: Phillip N. Ware District 07 - Miami

TO: Mrs. Betty Potts Bureau of Legal Services
Tallahassee

RE: John Errol Ferguson DOC #015110

Per your telephone request of 8/23/79, I am enclosing herewith copies of what appears to be pertinent material in the case of the above-named death row inmate. Please note that I included the original copies of some institutional material as the xerox copies were of poor quality.

As soon as Mr. Lipson can review and have the latest Post Sentence Investigation retyped, I will forward copies to Barbara Maxwell at the Supreme Court, to Bureau of Offender Records, and to Florida State Prison as you instructed.

Phillip N. Ware

Phillip N. Ware
District Supervisor
District 07 - Miami

PNW/bjf

0

AUG 28 1979

IN THE SUPREME COURT OF FLORIDA
FRIDAY, AUGUST 3, 1979

WILLIAM LEE THOMPSON, COST.

APPELLANT,

VS

CASE NUMBER 33,697

STATE OF FLORIDA

APPELLEE.

IT IS HEREBY ORDERED that the Parole and
Probation Commission transmit to the Clerk of the Supreme
Court of Florida forthwith the pre-sentence investigation
in this cause.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BY: Rolando D. Madaleno
Deputy Clerk

BDM
~~S.~~ Hon. Louie Wainwright

IN THE SUPREME COURT OF FLORIDA
THURSDAY, AUGUST 16, 1979

62

RALEIGH PORTER

APPELLANT,

VS

CASE NUMBER 33,341

STATE OF FLORIDA

APPELLEE.

IT IS HEREBY ORDERED that the *Dept. of Corrections*
~~Probation Commission~~ transmit to the Clerk of the Supreme
Court of Florida forthwith the pre-sentence investigation
in this cause.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BDM

C: Louie Wainwright
Hon. Jim Smith
Hon. Jack O. Johnson

BY *Barbara D. Maxwell*
Deputy Clerk

IN THE SUPREME COURT OF FLORIDA
THURSDAY, AUGUST 16, 1979
AUG 23 4 30 PM '79

RALEIGH PORTER

Appellant,

vs.

STATE OF FLORIDA

Appellee.

CASE NUMBER 53,841

RESPONSE

Comes now, Florida Parole and Probation Commission, and makes this Response to this Court's Order of August 16, 1979 in the above-styled cause.

With all due respect, the Florida Parole and Probation Commission is unable to comply with this Court's Order because it is not the custodian of the documents sought by the Court. All Pre-Sentence Investigations are under the control and custody of the Florida Department of Corrections. See Section 20.315 (22) F.S. Further, the Florida Parole and Probation Commission no longer conducts Pre-Sentence Investigations. That function is also now to the Department of Corrections. See Section 945.25; 945.10 F.S.

In accordance with a request made by the Clerk of the Court, the Florida Parole and Probation Commission is forwarding this Court's Order in the above-styled cause to the Department of Corrections.

Respectfully submitted,


MICHAEL H. DAVIDSSON

General Counsel

Florida Parole & Probation Commission
1309 Winewood Blvd. - Bldg. 6
Tallahassee, Florida 32301
(904) 488-4460

(copy of PSI forwarded to
Supreme Court 8-23-79.
A. Bitts)

IN THE SUPREME COURT OF FLORIDA
FRIDAY, SEPTEMBER 28, 1979

Putnam Co.

HALL, FREDDIE LEE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**

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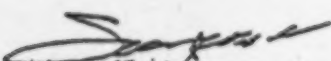
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CASE NO. S4,423

It is hereby ordered that the Division of Corrections
transmit to the Clerk of the Supreme Court of Florida forthwith
the pre-sentence investigation in this cause.

A True Copy

TEST:


Sid J. White
Clerk, Supreme Court

H
cc: Hon. Louie Wainwright
Morton D. Aulls, Esquire
H.D. Robuck, Jr., Esquire
Attorney General's Office,
Tampa



FLORIDA
DEPARTMENT of
CORRECTIONS

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5021

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

October 23, 1979

Mr. Sfd J. White
Clerk, Supreme Court
The Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

Re: Freddie Lee Hall, #02276Z
Case No. 54,423

Dear Mr. White:

In response to the order dated September 28, 1979, it has been determined that no Presentence Investigation was conducted for either of this individual's death sentences.

Mr. Hall was convicted in the Circuit Court for Lake County on June 1, 1978, for MURDER IN THE FIRST DEGREE, and sentenced to death by Judge John W. Booth. Mr. Hall was further convicted in the Circuit Court for Putnam County on June 23, 1978, also for MURDER IN THE FIRST DEGREE and was sentenced to death by the same Judge Booth. No Presentence Investigation was requested on either of these offenses.

Mr. Hall was convicted on August 30, 1978, in the Circuit Court for Pasco County for the offense of ATTEMPTED MURDER IN THE FIRST DEGREE and was sentenced to 30 years in prison to run consecutive with any other sentences by Judge Wayne L. Cobb. Judge Cobb had requested a Presentence Investigation on July 24, 1978, and this was available to him at the time he imposed the prison sentence but was not available to Judge Booth on the previous sentences.

Please advise if we may be of any further assistance to you in this matter.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Leonard E. Flynn, Director
Probation and Parole Services
Program Office

WCK/pg
cc: Inmate File

Putnam

IN THE SUPREME COURT OF FLORIDA
TUESDAY, JANUARY 15, 1980

FREDDIE LEE HALL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**

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**

**


CASE NO. 54,561

** **

It is hereby ordered that the Division of Corrections
transmit to the Clerk of the Supreme Court of Florida forthwith
the pre-sentence investigation in this cause.

A True Copy

TEST:


Sid J. White
Clerk, Supreme Court

H
cc: Hon. Louie Wainwright
Morton D. Aulls, Esquire
H. D. Robuck, Jr., Esquire
Robert J. Landry, Esquire



FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard - Tallahassee, Florida 32301 - 904/488-5021

January 18, 1980

Mr. Sid J. White
Clerk, Supreme Court
The Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

Re: Freddie Lee Hall, #022762
Case No. 54,561

Dear Mr. White:

In response to the Court Order dated January 15, 1980, it has been determined that no Presentence Investigation was conducted for this individual's death sentence in Putnam County.

I am attaching a copy of my letter to you of October 23, 1979, in response to the previous Court Order on this individual.

Please advise if we may be of any further assistance to you in this matter.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Leonard E. Flynn, Director
Probation and Parole Services
Program Office

WCK/de
Attachment

Inmate file

gack
78-200
78-201
1-17-53

IN THE SUPREME COURT OF FLORIDA
MONDAY, OCTOBER 15, 1979


JIMMIE LEE SMITH
APPELLANT,
VS
STATE OF FLORIDA
APPELLEE.

CASE NUMBER 55,961

IT IS HEREBY ORDERED, that the Department
of Corrections transmit to the Clerk of the Supreme
Court of Florida forthwith the presentence investigation
in this cause.

A TRUE COPY

TEST


Sid J. White
Clerk, Supreme Court

BDM

C: Louie Wainwright
Louis G. Carres, Esq.
Hon. Jim Smith

October 26, 1979

Mr. Sid White
Clerk, Supreme Court
Supreme Court Building
Tallahassee, Florida 32301

Re: Jimmie Lee Smith, #035167

Dear Mr. White:

This is in response to your court order of October 15, 1979, directing us to forward a copy of the presentence investigation in the above subject's case.

After checking with the Clerk of the Court, Jackson County and the District Probation & Parole Office for Jackson County, we find that a presentence investigation was not prepared in Mr. Smith's case.

If we may be of further assistance, please advise.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carmichael
Chief, Bureau of Offender Records

LHC/jb

IN THE SUPREME COURT OF FLORIDA
MONDAY, OCTOBER 15, 1979


MANUEL VALLE, **
Appellant, **
vs. **
STATE OF FLORIDA, **
Appellee. **
_____ **

CASE NO. 54,572

It is hereby ordered that the Division
of Corrections transmit to the Clerk of the Supreme Court
of Florida forthwith the presentence investigation in
this cause.

A True Copy

TEST:


Sid J. White
Clerk Supreme Court

ner
CC:

Hon. Louis Wainwright

Ira N. Loewy, Esq.
Elliot H. Scherker, Esq.



FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard - Tallahassee, Florida 32301 - 904/488-5021

October 25, 1979

Mr. Sid J. White
Clerk, Supreme Court
Supreme Court Building
Tallahassee, Florida 32301

Re: MahueI Valle, #853220

Dear Mr. White:

We are in receipt of your court order dated October 15, 1979, directing this Department to forward a copy of the presentence investigation in the above, referenced individual's case.

A check of our records reflects that a presentence investigation was not prepared on Mr. Valle's death sentence. Subject was on probation at the time the crime was committed and a Violation Report Form was prepared in lieu of a presentence investigation.

We are enclosing a copy of the Violation Report, and request that you please advise if this does not comply with the intent of your order.

Sincerely,

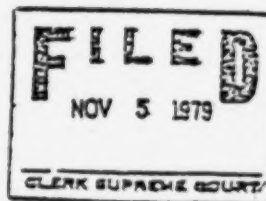
LOUIE L. WAINWRIGHT, SECRETARY

Louis H. Carmichael

Louis H. Carmichael
Chief, Bureau of Offender Records

LHC/db

Enclosure



RAYMOND LEE DRAKE,

Appellant,

vs.

CASE NO. 54,850

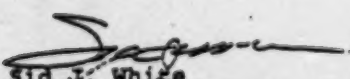
STATE OF FLORIDA,

Appellee.

It is hereby ordered that the Department of
Corrections transmit to the Clerk of the Supreme Court of Florida
forthwith the presentence investigation in this cause.

A True Copy

TEST:


Sid J. White
Clerk, Supreme Court

B

cc: Louie L. Wainwright
Paul C. Helm, Esq.
James S. Purdy, Esq.

December 5, 1979

Mr. Sid J. White
Clerk of the Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: Raymond Lee Drake, #A05544Z

Dear Mr. White:

This is in response to your court order dated November 26, 1979, in the above named individual's case #54,350.

Attached is a presentence investigation completed, covering this individual's Involuntary Sexual Battery offense, for which he received a 6-month to 5-year sentence in August of 1976. This individual was released on parole, violated the conditions thereof, and was returned to our custody under the Death penalty in 1973.

The investigation of the murder sentence was completed on Form-91, copy of which is attached completed by his parole supervisor. We do not have a presentence investigation in this murder case, only the Form-91, which is attached.

If we can be of further assistance please let us know.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

Joye C. Bruce
Assistant Inmate Records Administrator

JCB/sl

Attachment

Escambia

IN THE SUPREME COURT OF FLORIDA
TUESDAY, JANUARY 13, 1980

JOHNSON, MARVIN EDWIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

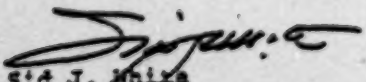
•• •• •• •• •• •• •• •• ••

CASE NO. 56,167

It is hereby ordered that the Division of Corrections
transmit to the Clerk of the Supreme Court of Florida forthwith
the pre-sentence investigation in this cause.

A True Copy

TEST:


Sid J. White
Clerk Supreme Court

H
cc: Hon. Louis Mainwright
Louis G. Carres, Esquire
A. S. Johnston, Esquire



FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5027

January 18, 1980

Mr. Sid J. White
Clerk, Supreme Court
The Supreme Court of Florida
Supreme Court Building
Tallahassee, FL 32301

Re: Marvin Edwin Johnson, B018685
Case No. 56,167

Dear Mr. White:

In response to the order dated January 15, 1980, please be advised that there was no Presentence Investigation ordered by Judge William Frye III in Escambia County prior to sentencing.

Please advise if we may be of any further service to you in the matter.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Leonard E. Flynn, Director
Probation and Parole Services
Program Office

WCX/de

Inmate File

15
reel 8

IN THE SUPREME COURT OF FLORIDA
FRIDAY, JANUARY 25, 1980

JONES, LESLIE R.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

**

**

**

**

**

CASE NO. 56,199

** **

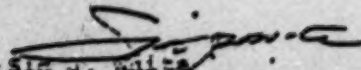
It is hereby ordered that the Division of Corrections
transmit to the Clerk of the Supreme Court of Florida forthwith
the pre-sentence investigation in this case.

A True Copy

TEST:

H
cc:

Hon. Louis Wainwright
Michael M. Corin, Esquire
David P. Gaudin, Esquire


Sir J. White
Clerk, Supreme Court

January 31, 1960

Mr. Sid White
Supreme Court Building
Tallahassee, Florida 32304

RE: Leslie R. Jones, #047325

Dear Mr. White:

Attached is the PSI you requested in the Court Order dated January 25, 1960.

If we can be of further assistance please let us know.

Sincerely,

LOUIE L. WALDRIGHT, SECRETARY

Joye C. Bruce
Assistant Inmate Records Administrator

JCB/sl

Attachment

FEB 11 11 1

047325

TITLE Leslie R. Jones v. State

CASE NO. 56,199

DATE 2/4/80

RECEIPT IS ACKNOWLEDGED OF:

☒ Pre-sentence Investigation.

RECEIVED
CLERK
COURT

BRIEF

APPENDIX

REQUEST FOR ORAL ARGUMENT

PETITION FOR ATTORNEY'S FEES

PETITION FOR REHEARING

ORIGINAL RECORD/EXHIBITS

PETITION FOR WRIT OF HABEAS CORPUS/MANDAMUS

ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

LETTER OF _____

RESPONSE TO _____

COPY OF _____

SID J. WHITE, Clerk
Supreme Court of Florida

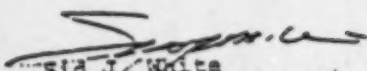
RUFUS EUGENE STEVENS, **
 Appellant, **
vs. **
STATE OF FLORIDA, **
 Appellee. **
_____ **

CASE NO. 57,738

It is hereby ordered that the Division of
Corrections transmit to the Clerk of the Supreme Court of Florida
forthwith the pre-sentence investigation in this cause.

A True Copy

TEST:


Sid J. White
Clerk Supreme Court

per
CC: Hon. Louie Wainwright

John R. Forbes, Esquire
T. Edward Austin, Esquire



FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WADSWORTH

1311 Winewood Boulevard • Tallahassee, Florida 32301 • 904/488-5021

April 30, 1980

Mr. Sid J. White
Clark, Supreme Court
Supreme Court Bldg.
Tallahassee, Florida

Re: Rufus Eugene Stevens
DOC #069219
Case No. 57,738

Dear Mr. White:

Persuant to the Supreme Court Order of 4/10/80, please find attached a copy of the Presentence Investigation conducted by our staff prior to the above named individual being given the death sentence.

If we may be of any further service to you, please feel free to call upon us.

Sincerely,

LOUIE L. WADSWORTH, SECRETARY

William C. Kyle, Jr.
William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Leonard E. Flynn
Probation and Parole
Program Director

WCK/de
Attachment

cc: Inmate's File

IN THE SUPREME COURT OF FLORIDA
WEDNESDAY, MAY 21, 1980

JAMES A. MORGAN

APPELLANT,

VS

CASE NUMBER 53,418

STATE OF FLORIDA

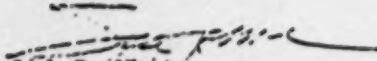
APPELLEE.

2

IT IS HEREBY ORDERED, that the Department of
Corrections transmit to the Clerk of the Supreme Court of
Florida forthwith the presentence investigation in this cause.

A TRUE COPY

TEST:


Sid J. White
Clerk, Supreme Court

BDM

C: Louie Wainwright
Craig S. Barnard, Esquire
Paul H. Zacks, Esquire



Office of the Public Defender

FIFTEENTH JUDICIAL CIRCUIT

13th Floor / Harvey Building

234 Gadsden Street

West Palm Beach, Florida 33401

RICHARD L. JORANDBY
Public Defender

Telephone (305) 837-2100

June 1, 1980

Honorable Sid J. White, Clerk
Supreme Court of Florida
Supreme Court Building
Tallahassee, Florida 32304Re: James A. Morgan v. State of Florida
Case No. 53,418

Dear Mr. White:

I am writing regarding the order entered on May 21, 1980 in the above-referenced case. That order required the Department of Corrections to transmit to your office the presentence investigation in this case.

This letter is to serve as a formal request for notification of any oral or written response by the Department of Corrections relative to that order and to request full conformed copies of all documents, records, reports, etc. furnished to the Court pursuant to that order (regardless of their designation as confidential). Such copies and notification may be served on myself as counsel for Mr. Morgan.

Thank you very much for your assistance.

Cordially,

Craig S. Barnard
Chief Assistant Public Defender

CSB/fv

STYLE James A. Morgan vs. State of Florida

CASE NO. 53,418

DATE 6/9/80

RECEIPT IS ACKNOWLEDGED OF:

RECEIVED

- ☐ BRIEF
☐ APPENDIX
☐ REQUEST FOR ORAL ARGUMENT
☐ PETITION FOR ATTORNEY'S FEES
☐ PETITION FOR REHEARING
☐ ORIGINAL RECORD/EXHIBITS
☐ PETITION FOR WRIT OF HABEAS CORPUS
☐ ORIGINAL WRIT WITH ACCEPTANCE OF SERVICE THEREON

JUN 13 1980

LETTER OF REQUEST--June 3, 1980

RESPONSE TO

COPY OF

SID J. WHITE, Clerk
Supreme Court of Florida

June 9, 1960

Mr. Sid J. White, Clerk
Supreme Court
Supreme Court Building
Tallahassee, FL

Re: James Aaron Morgan, #062868
Your Number 53,418

Dear Mr. White:

Pursuant to the order of the Florida Supreme Court of May 21, 1960,
please find attached a copy of the Presentence Investigation conducted
on the above named individual.

If we may be of any further assistance to you in this matter, please
advise.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Probation and Parole
Program Director

WCK/pg
Attachment

IN THE SUPREME COURT OF FLORIDA

MONDAY, JUNE 9, 1980

PRESTON JUNIOR CRUM, *

Appellant, *

VS. *

CASE NO. 57,487

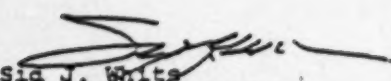
STATE OF FLORIDA, *

Appellee. *

It is hereby ordered that the Department of Corrections transmit to the Clerk of the Supreme Court of Florida forthwith the presentence investigation in this cause.

A True Copy

TEST:


Sid J. White
Clerk Supreme Court

B

cc: Louie L. Wainwright, Secretary
Robert Q. Williams, Esq.
William H. Stone, Esq.
Edwin H. Duff, III, Esq.

There was no PSI done prior to sentencing!

June 16, 1980

Mr. Sid J. White
Clark
Supreme Court
Supreme Court Bldg.
Tallahassee, FL 32301

Re: Preston Crum, Jr.
A013915
Case No. 57,487

Dear Mr. White:

In regard to the Court's Order of June 9, 1980, please be advised that there was no Presentence Investigation conducted on this individual prior to his being sentenced to death in Lake County.

Sincerely,

LOUIE L. WADSWORTH, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Leonard E. Flynn
Probation and Parole
Program Director

WCK/de

IN THE SUPREME COURT OF FLORIDA
MONDAY, JUNE 9, 1980

GEORGE VICTOR FRANKLIN, a/c/a
CHARLES GORDON,

Appellant,

v.

CASE NO. 52,971

STATE OF FLORIDA,

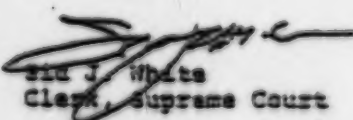
Appellee.

** ** * ** * ** * ** *

It is hereby ordered that the Division of Corrections
transmit to the Clerk of the Supreme Court of Florida forthwith
the pre-sentence investigation in this cause.

A True Copy

TEST:


J. J. White
Clerk, Supreme Court

H
cc: Hon. Louis Wainwright
Isabees W. Wright, Esquire
State Attorney, Ft. Lauderdale

June 16, 1980

Mr. Sid J. White
Clerk
Supreme Court
Supreme Court Bldg.
Tallahassee, FL 32301

Re: George Victor Franklin
a/k/a Charles Gordon
062595
Case No. 52,971

Dear Mr. White:

Pursuant to the Court's Order of June 9, 1980, please find attached a copy of the Presentence Investigation for the above named individual regarding his conviction in Broward County for Murder In The First Degree.

Sincerely,

LOUIE L. WADSWORTH, SECRETARY

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

Edward E. Flynn
Probation and Parole
Program Director

WCK/de
Attachment

A046920

IN THE SUPREME COURT OF FLORIDA

WEDNESDAY, AUGUST 6, 1980

FRANK SMITH JR
Appellant,

v.

CASE NUMBER 57,743

STATE OF FLORIDA
Appellee.

IT IS HEREBY ORDERED, that the Department of Corrections
transmit to the Clerk of the Supreme Court of Florida forthwith,
the presentence investigation in this cause.

A TRUE COPY

TEST:

Sid J. White
Clerk, Supreme Court

BDM

C: Louie Wainwright
Philip J. Padovano, Esquire
David McGee, Esquire
Hon. Jim Smith

BY: Robert D. Massey
Deputy Clerk



FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard - Tallahassee, Florida 32301 • 904/488-5021

August 18, 1980

Mr. Sid J. White, Clerk
Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: Frank Smith, Jr., #6046920

Dear Mr. White:

Pursuant to the courts order of August 6, 1980, please find attached a copy of the Presentence Investigation for the above named individual.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.

William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

WCKjr:jw

Attachment

cc: Inmate File

Leonard E. Flynn
Leonard E. Flynn
Probation and Parole Program
Director

In error!
No PHI!!



FLORIDA
DEPARTMENT of
CORRECTIONS

Governor
BOB GRAHAM
Secretary
LOUIE L. WAINWRIGHT

1311 Winewood Boulevard - Tallahassee, Florida 32301 - 904/488-5021

August 26, 1980

Mr. Sid J. White
Florida Supreme Court
Supreme Court Building
Tallahassee, Florida 32304

RE: Frank Smith, Jr., DOC# 046920
Case# 75,743

Dear Mr. White:

Please disregard my letter of August 18, 1980, allegedly attaching a copy of a Presentence Investigation on the above named individual. It was brought to my attention by Ms. Phyllis Bamberg of your office on August 23, 1980, that the report sent to you was actually a Postsentence Investigation.

This is to inform you that there were no Presentence Investigation conducted for this individual's sentence from Wakulla County. It would be appreciated if you would return the copy of the Postsentence Investigation to this office.

Sincerely,

LOUIE L. WAINWRIGHT, SECRETARY

William C. Kyle, Jr.
William C. Kyle, Jr.
Offender Intake & Investigation
Program Administrator

WCKJr/jw

cc: Inmate file

Leonard E. Flynn
Leonard E. Flynn
Probation and Parole Program
Director

AFFIDAVIT

STATE OF FLORIDA
LEON COUNTY

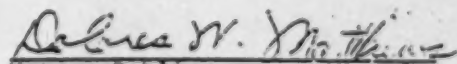
I, LOUIS G. CARRES, first having been duly cautioned and sworn state the following:

On September 13, 1977, I personally reviewed certain inmate files maintained by the Department of Offender Rehabilitation (now Department of Corrections) at it's central office in Tallahassee, Florida. At that time and place I personally observed three (3) letters from the Supreme Court of Florida requesting that the Department of Offender Rehabilitation forward to the Court the latest psychiatric evaluation on three (3) inmates who were on death row to wit: (1) Robert Fieldmore Lewis; (2) Rocco Surace; and (3) Anthony Antone. The letter from the Supreme Court of Florida pertaining to Mr. Lewis was dated August 4, 1977. The letter from the Supreme Court of Florida pertaining to Mr. Surace was dated February 10, 1977. The letter from the Supreme Court of Florida pertaining to Mr. Antone was dated March 4, 1977. In reviewing these three (3) letters I noted there was no indication on them that counsel for the applicable inmate-appellant had been advised of the Court's request by copy thereof.

Before me this date personally appeared Louis G. Carres, who having been duly sworn, deposes and says that the above information is true and correct to the best of his knowledge and belief.


LOUIS G. CARRES

Sworn to and subscribed before me this 28th day of August A.D. 1980.


Notary Public
State of Florida at Large

My commission expires

Notary Public, State of Florida at Large
My Commission Expires August 1, 1982

section

TUESDAY, AUGUST 19, 1990

B

Justices saw 'confidential' psychological profiles of death row inmates

By KELLY SCOTT

St. Petersburg Times Staff Writer

© 1990, The St. Petersburg Times

TALLAHASSEE — Without the knowledge of defense attorneys, the Florida Supreme Court obtained psychological profiles of at least 20 men who were waiting on death row for the court to review their death sentences.

The practice apparently violated a U.S. Supreme Court decision giving all defendants a constitutional right to see and challenge any information used in determining their sentences.

"In some cases, we ended up with information we were not supposed to see," Justice Ben F. Overton conceded in an interview with *The St. Petersburg Times*.

But he said the court got the reports "inadvertently" and denied that justices actually used the reports in deciding whether the men should be given life in prison instead of death in the electric chair.

THE PROFILES were written by a psychologist in the State Department of Corrections after interviews and tests of the condemned men. The inmates were never told that the information might be used by the Supreme Court as it decided whether to uphold or overturn their sentences.

Overton, who was chief justice when the court obtained the reports, said the court had asked the Corrections Department for presentence reports, but sometimes received reports compiled after the sentencing.

Court records show, however, that the court specifically asked for the psychological profiles.

The reports were later removed from the court file, but not before some of the justices saw them.

"The appellate process was compromised," said Bruce Rago, a professor of law at Nova University who represents a death row inmate. "It was error to go outside the record, especially without notifying opposing lawyers. It was wrong for that to happen. They have admitted that by stopping the practice."

Another defense lawyer, Ted Mack of Tallahassee, has already raised the issue with

the court. On behalf of convicted killer Charles Dwight Menzer, Mack is seeking a hearing to determine whether the court received a psychological report on Menzer, whether any justices read it and when it was destroyed.

"I think there's a very serious legal and ethical question that the Supreme Court is going to have to answer to," Mack said in a recent interview.

It's possible that some of the defendants whose profiles were obtained by the court will get new sentencing hearings because of the mistake. The mistake will not affect the convictions themselves.

THOUGH SOME OF THE justices remembered looking at the reports, all of

them said the reports had no effect on their decisions.

Alan Sundberg, who became chief justice last month, figures he read the reports. "I don't have any independent recollection," he said. "I'm sure I did."

Asked if he thought it was appropriate for him to read them, Sundberg said, "If you ask if it influenced my decision, no, I don't think it did. I'm more concerned about that transcript, what the record says . . . I don't believe I was compromised, if that's your bottom line."

Justice Arthur England said he remembers seeing the reports in the files under a distinctive pink cover sheet, but he said he did

S-4 PROFILES, 6-B

Profiles from 1-8

not read them. "The answer to your question is it would be pretty outrageous if we considered something like that, because it's not part of the record. And we haven't," England said.

"I might have seen one," said Justice James C. Adkins. "I would have casually overlooked it if I did. I've never read one. I wouldn't pay any attention to it. I would never request anything like that. I'm just not one of them that does that, requests anything further. I don't think we should."

Joseph W. Hatchett, who left the court in 1979 to become a federal appeals judge, would not comment. "You have to understand, there could be litigation on that matter, and I was a member of the court at the time," Hatchett said.

Justice Joseph A. Boyd said, "The only time we would do it (order the reports) would be if the trial record indicated there was some reason to."

BOYD SAID HE did not know that some attorneys were not aware their clients were being psychologically evaluated for the Supreme Court's review. "If the lawyer didn't get notified, I think that's very interesting. The court would like to know why that happened," Boyd said.

Even if justices did read the psychological reports, Justice Overton said, they wouldn't have considered them in determining the appropriateness of the sentence. "Judges are trained to make their consideration based solely on what is admissible," Overton said.

Fred Karl, the seventh member of the court when the reports were being received, could not be contacted.

Records of the Supreme Court and the Corrections Department show that 19 psychological reports on condemned murderers were sent to the court between November 1976 and May 1978. A psychological report on death row inmate Douglas Ray Meeks was requested and sent to the court as early as March 1976. Gov. Bob Graham signed a death warrant for Meeks on Jan. 9, 1980, but Meeks won a stay of execution.

Most of the men are still on death row, but the Supreme Court granted new sentences or actually reduced the sentences to life for a few of the men. Among the cases are these:

Carl Ray Songer, convicted of murdering a Florida Highway Patrol trooper in Citrus County in 1973 after escaping from an Oklahoma prison.

Anthony Antone, convicted in the 1976 murder of Tampa policeman Richard Cloud.

Arthur P. Goode III, convicted of killing an 11-year-old boy from Falls Church, Va. and a 3-year-old boy from Cape Coral.

Daniel Morris Thomas, twice sentenced to death for his role as leader of the ski-mask gang, which terrorized towns in Central Florida in late 1975 and early 1976.

A PSYCHOLOGICAL REPORT was also requested and received on Jesse Lamar Hall, who was convicted in Pinellas County in 1976 of the murder of two Palm Harbor teenagers. Hall's conviction was reversed by the Florida Supreme Court late last year. Before a retrial, Hall pleaded no contest to murder and was sentenced to life in prison.

The requests for the reports apparently stopped in mid-1978, after an exchange between a defense attorney and Overton during oral arguments in the Paul McGill case.

McGill, 18, had been convicted and sentenced to death for robbing, raping and murdering a young female convenience-store clerk near Ocala. On appeal, Overton asked an assistant attorney general about McGill's reactions under stress and his suicidal tendencies.

"We have a copy of a psychological screening report and that screening report says in part that he feels very limited control in stressful situations . . . and then also shows that he will become possibly suicidal," Overton said during the hearing.

Margaret Good, a Tallahassee public defender who was arguing McGill's case, told the justices she didn't have a copy of the report and didn't know it was part of the record in the case.

The next day she filed a motion to get a copy, and the court gave her one. But the same day, Ma. Good received a letter from Court Clerk Sid White stating that the psychological report had been "stricken" from the case.

Overton said he recalls that he was the one who discovered that the reports were in the files, but he does not recall whether it was because of the McGill case.

OVERTON SAID THE reports, including the one in the McGill case, were obtained by mistake during the court's effort to fulfill the edict of the U.S. Supreme Court in the case of *Gardner vs. Florida*.

Daniel Wilbur Gardner was convicted and sentenced to death for the stabbing murder of his wife in Citrus County. But the U.S. Supreme Court, while upholding the conviction, overturned the death sentence because the judge considered a "confidential" portion of a presentence report, which Gardner's attorneys had not been permitted to see.

The U.S. Supreme Court said Gardner was denied due process of law because he could not deny or explain information in the report before he was sentenced to death. The Florida Supreme Court had said that the practice was constitutional.

Gardner was resentenced to life in prison.

After the U.S. Supreme Court's ruling, Overton said, the Florida Supreme Court made a special effort to seek any information the trial judge had when he sentenced a



'In some cases, we ended up with information we were not supposed to see.'

—Justice
Ben F.
Overton

convicted man to death.

For example, a "Gardner order" form was printed and sent to each trial judge who sentenced a convicted man to death. The order asks the judge to return a sworn statement saying whether he or she considered any information that the defendant or his defense attorney didn't know about.

ANOTHER PART OF THE court's effort, Overton said, was to ask the Florida Department of Probation and Parole for any background report on the death row inmate, called a pre-sentence investigation (PSI) report, that the trial judge had.

"What we asked for was the PSI, and we ended up getting a post-sentence report and the psychologicals," Overton said. "It's not unusual that it (a psychological report) would be attached to the post-sentence report. That is not what we intended to have or what we should have had."

But the psychological reports were not attached simply as a matter of routine. Court Clerk White's office sent a separate letter asking for them.

One letter ordered the PSI, and copies of the letter were sent to prosecutors and defense attorneys.

The second letter went to the Department of Offender Rehabilitation, which has since been renamed the Department of Corrections. "This is to request a copy of the latest psychiatric evaluation made on the above-named inmate who is on death row." In only one case is there a notation that copies of the letter were sent to lawyers involved in the case, and that defense attorney says he never got the court's letter or a copy of the psychological report.

Overton said he did not direct White to send separate letters. "They were to get the necessary information, that's all," Overton said.

After he decided the court shouldn't have gotten the psychological reports, Overton said, he directed Sid White to "review everything in the files and make sure we didn't have anything that was done subsequent to sentencing."

WHITE, WHO IS IN charge of all court records, said Overton told him to remove all the reports from the files. The reports were destroyed, White said.

Overton could not explain why, if the requests were routine following the Gardner decision, psychological reports were requested on some death row defendants and not others. And the court requested at least five of the profiles before, rather than after, the U.S. Supreme Court's ruling in Gardner.

White says the assistant clerk who wrote the letters misunderstood his instructions and mistakenly wrote the letters requesting the psychological reports.

Overton later called *The Times* to say he had found the form letter from which the assistant typed the requests. It indicates that copies should be sent to all attorneys, Overton said. It was a clerk's error, he said, that no copies of the Supreme Court requests were actually sent to the lawyers.

"I'm not saying that people don't goof," Overton said. "Even newspapers make mistakes."

He added, "There was no intent to hide anything or no intent to get any information the lawyers didn't have."

In one of the cases the court was considering, there was a mention of a psychological evaluation done in concert with the pre-sentence investigation, Overton said. The court wanted to see that, and White's office interpreted that as an order to get psychological reports in all cases, he said.

Vernon Bradford, a spokesman for the Department of Corrections, confirmed that the Supreme Court requested the reports. There is no record, he said, of exactly how many were requested or when the practice stopped.

THE PRISON SYSTEM employs a full-time psychiatrist, a full-time clinical psychologist and two psychologists with master's degrees.

All prisoners, including death row inmates are tested when they enter the prison system and "from time to time" as part of a review of their progress, Bradford said. The prisoners are interviewed and given standardized tests. Their lawyers are not routinely notified.

These are the reports that were sent to the court, Bradford said.

"Now you have to consider, what are the legal consequences of that mistake?" said Rogo of Nova University. "Was there any harm caused? Each attorney will have to review his or her case, look at the whole record and measure this against it."

Justices Admit Access To Death-Row

Inmate Reports

TALLAHASSEE (UPI) — Supreme Court justices admitted Tuesday they had access to psychological reports on 20 death-row inmates that they should not have seen while reviewing the appropriateness of the penalty in the cases — but denied it influenced their decisions on whether the men should live or die.

"I am satisfied to a moral certainty that the reports did not influence the outcome of any case," Chief Justice Alan Sundberg said in an interview.

"To the extent that anyone can demonstrate prejudice," he said, "the court will entertain appeals and we'll have to take it on a case-by-case basis."

Tallahassee attorney Ted Mack has raised the issue on behalf of convicted killer Charles Dwight Messer. He asked for a hearing to determine if the court received a psychological report on Messer and whether the justices read it.

"I think there's a serious legal and ethical question that the Supreme Court is going to have to answer to," he said.

"If the court should find error, it would not affect the conviction, but only the sentence."

The St. Petersburg Times revealed in a copyrighted story Tuesday that the court, without the knowledge of defense attorneys, obtained psychological profiles of at least 20 men waiting on death row for the court to review their sentences. The reports were made by the Department of Correction's parole and probation section between 1976 and mid-1978.

The U.S. Supreme Court has ruled that the courts cannot use any information in sentencing a convicted murderer that is not also available to defense attorneys.

Justice Ben Overton was chief justice at the time the post-sentencing psychological reports were received. He said they were obtained by mistake by the clerk's office. When the error was discovered, he said, the reports were removed from the files and returned to the department.

Overton said the court wanted to be sure it had all the information available to the trial judge in sentencing a convicted killer to death rather than life in prison.

In one case, he said, reference was made to a psychological report that was not in the file.

"One judge (nobody now can remember which one) noticed it and asked the clerk to get the report," Overton said. One of the deputies interpreted the instruction to mean that psychological reports were to be required in all cases, rather than just the one.

Overton can recall reading only the report on the case which prompted the complaint. Sundberg can't recall any of them, but said if they were a part of the record, he must have read one or more of them.

"But I am confident it did not affect the outcome of a single case," he said.

Justice Arthur England recalled seeing the reports, but said he didn't read them, adding, "It would be pretty outrageous if we considered something like that because it's not part of the record. And we haven't." Justice James Adkins Jr. said he might have seen one or more but never read them. Justice Joe Boyd said he didn't know attorneys were unaware that their clients were being psychologically evaluated and wants to know why they weren't told.

Two other justices on the court at the time — Fred Karl and Joseph Hatchett — are no longer members. Karl is in private practice and Hatchett is a federal appeals judge.

One of the cases in which a report was requested was that of Douglas Ray Meeks for whom the governor signed a death warrant last January. Meeks won a stay of execution.

None of the 20 has been executed and most are still on death row. The court granted new sentences or actually reduced the sentences to life for a few.

Among the cases are Carl Ray Songer, sentenced for killing a highway patrolman in Citrus County in 1972; Arthur Gunde III, convicted of killing a young Cape Coral boy in 1976; Anthony Antonio, sentenced in the 1975 murder of Tampa policeman Richard Cloud; and Daniel Thomas, leader of a drug-smuggling gang that terrorized central Florida with a series of killings in 1975.

RUBBER STAMPS

Papers barred, yet high court looked at them

BARBARA MALONE and KEN WALTON
Miami Staff Writers

Defense attorneys across the state are preparing to attack the death sentences of all 151 people on Florida's death row, contending that the Florida Supreme Court issued its psychological reports on some of the condemned in violation of a U.S. Supreme Court ruling.

The defense lawyers say that the Florida judges violated the Supreme Court decision by looking at reports by prison psychologists without discussing the conclusions to lawyers for the condemned.

That is grounds for overturning the sentences, said the lawyers, most of whom decide to be acquitted while the statewide challenge is being prepared.

"The U.S. Supreme Court has held that it is just not fair to a death case for a judge to have a death sentence without information — that a defense attorney has a right to know what the information is in order to argue against it," said Deborah Pitt, an attorney with the NAACP Legal Defense Fund who is helping to coordinate the Florida appeal.

"If judges are making a decision about whether or not you live or die, you want to make sure that the information they are considering is accurate," Pitt said.

The reports are based on mental examinations given by staff psychologists whose names are first submitted to prison. Defense attorneys say death row inmates had no warning that what they told prison psychologists might later be used by a court in deciding whether they should live or die.

The inmates acknowledge the court should not have had the reports, but say they never heard a lawyer's death ruling on one of them.

The defense lawyers claim the court wronged:

✓ **Overlooked its own role in obtaining the reports, which were not in trial court files.**

✓ **Didn't discuss them to all rooms, and didn't explain what criteria it used in deciding whom to obtain them.**

✓ **Didn't tell the lawyers on either side when it was obtaining them.**

The defense lawyers say they don't know on how many occasions, or for how long, the court obtained the psychological reports in death cases.

Justice Ben Overton said the reports found their way into the Supreme Court files "inadvertently" because of an error by a deputy clerk. He said he said the clerk to get a copy of a pre-sentence psychological report that had been considered by the trial judge but was not in the court file.

According to Overton, the deputy clerk misinterpreted his request, and began routinely ordering pre-sentence psychological reports made by staff psychologists at the Department of Corrections. Overton was chief justice at the time. Overton said he could remember the name of the deputy clerk.

Miami lawyer Robert Shomo, who as attorney general successfully argued the constitutionality of Florida's death penalty before the U.S. Supreme Court in 1976, said the attack is just a little late in mail revisions.

"Whenever you're dealing with the death penalty, there's something to be said for making sure you're saying they can't delay the process," said Shomo.

He predicted that the legal attack might result in delaying executions "a month or a year," but that it would not result in any reversal of the death penalty.

Defense attorneys say they report five members of the court to be on the bench. They are Chief Justice Alan Lewisburg and Justices Overton, James Adkins, Joseph Boyd and Arthur England. The other two justices, Porter McDonald and James Aherman, were not on the court when it obtained the reports.

Two former justices who sat on the court when it had the reports also are expected to be called as witnesses. They are Joseph Hachtel, now a judge on the U.S. Fifth Circuit Court of Appeals, and Fred Karl, who is in private law practice.

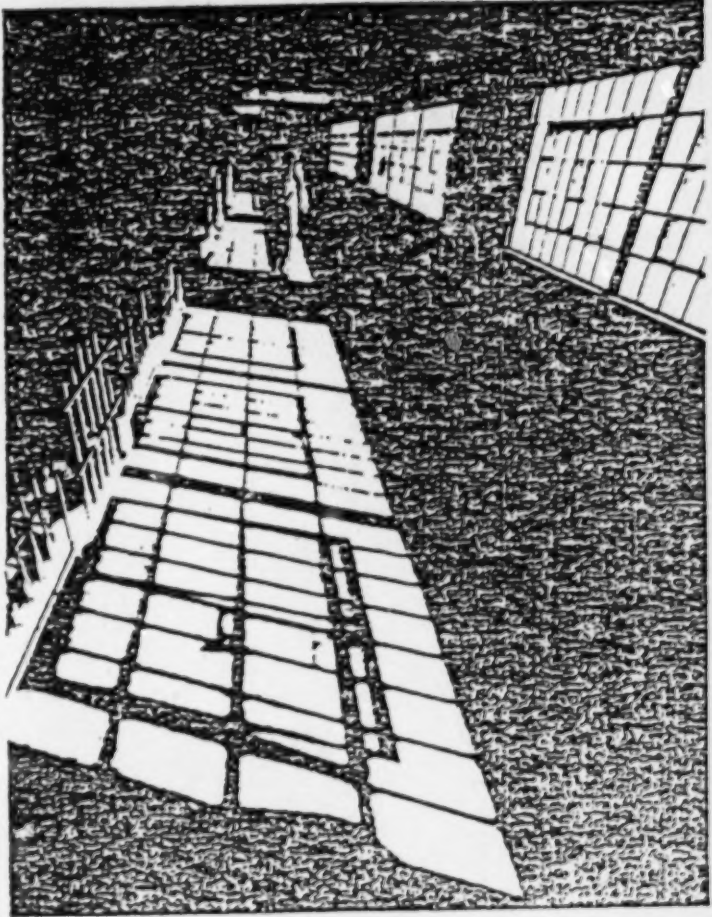
The St. Petersburg Times reported last month that the court in 1976-78 had looked at reports on some condemned men without discussing them to defense attorneys.

"In some cases, we mixed up with information we were not supposed to see," Justice Overton told the Times.

Justice Adkins told the Miami News he was opposed to the provision. "I didn't like what was going on," he said. "It looked to me like it was overreaching."

While several justices acknowledged that they read the reports when considering death sentences, they said they didn't rely on the reports in making decisions on executions.

Defense attorneys say the legal attack will be filed in both state and federal court. The challenge will contend that the court deprived death row inmates of due process if law attorneys who lawyers couldn't examine



or refuse information in the reports.

The first defense attorney to learn of the practice was Assistant Public Defender Margaret Gaud of Tallahassee, who in mid-1978 was arguing against the death penalty on behalf of Paul McGill, an 18-year-old sentenced to die for robbing, raping and murdering a convenience-store clerk near Ocala.

Overton spokeswoman Gaud about McGill's mental condition, referring to "a psychological or forensic report" which said in part that he was very intelligent, but that he was not a violent person.

Gaud told the court she did not have a copy of the report. She later filed a motion and withdrew one.

The court later reduced McGill's sentence to life. It did not comment in its opinion on whether the psychological report had played a part in the decision.

The incident occurred more than a year after the U.S. Supreme Court said in March 1977, in *Gardner v. Florida*, that defense attorneys in death penalty cases are entitled to see confidential information relied on by the trial judge.

Donald Gardner had been sentenced to death for slaying his wife in Citrus County. The U.S. Supreme Court upheld his conviction, but overturned the death sentence because the trial judge considered "confidential" material and disclosed to the defendant's attorneys.

Since that time, defense attorneys from around the state have been pushing information about death cases and have concluded that the psychological reports were considered by the Florida Supreme Court in at least 20, and possibly more, death cases.

Martha Hall, a former law clerk for Justice England when he was chief justice, told the Miami News that she was told to go through about 10 death row files in August or September of 1978 — shortly after Gaud had learned of the reports — and to put out all psychological reports.

Hall, who is now general counsel for the Department of Environmental Regulation, said she found reports in about 10 files and removed them. She said that after collecting the reports in a manila folder, she had

given them to her supervisor.

Hall said she did not see much of the correspondence whose reports she removed, and that the clerk, who was the reporter, was not the clerk.

Hall said England's chief law clerk, Mike Shomo, told her to get rid of the reports. Shomo, who is now with a Tallahassee law firm, said he does not recall saying that.

England said he did not recall seeing any psychological evaluations, or receiving them directly from the file.

"I don't recall filing any psychological evaluations, but that doesn't mean I haven't read one. I just don't remember it," England said.

"I don't remember having a clerk remove the reports from the files, either. But if Marty (Martha Hall) says I told her to do it, I must have told her," England said.

Overton said he considers psychological reports important because a death sentence may be mitigated if the defendant was suffering from extreme mental disturbance or could not control his conduct. But when he discovered psychological reports that had not been provided to defense counsel were in the files, he said, he tried to rectify the situation.

"After I found out what happened I ordered the psychological evaluations pulled from the files because they did not belong there," Overton said.

During the period when the psychological reports were being sent to the Supreme Court, the court issued the death sentence of John Spenkelink, who was executed in May, 1979. Spenkelink was the first — and so far the only — inmate to be executed in Florida since 1964.

Records in the Supreme Court clerk's office contain no indication that a psychological report on Spenkelink was ordered before his death sentence was upheld, according to deputy clerk Donal F. Jettre.

Hachtel said he expects the psychological reports to result in suits and he will have to require removal

Please see DEATH, 6A

DEATH, from SA

from sitting at the Appellate court judge's bench. "I am sure to be a witness."

Adkins acknowledged having some of the reports, but said he "didn't pay any attention" to them. "The only thing I ever considered was the factual situation and the record that the trial judge had in front of him," Adkins said.

While Adkins said he disapproved of the court's utilizing the psychological reports, he said the fact that it did should not "bother everything into a monumental issue that is going to turn the world upside down."

Sundberg said he remembers seeing some psychological evaluations in the files, and that he read them. "We are obliged to read a death case file from stem to stern," he said.

"I am convinced to a moral certainty that a psychological report did not affect my determination of a 1938 because of the decision-making process I go through," Sundberg said.

Kerr, who resigned from the court in April, 1978, said he could not remember whether he had seen any

of the psychological reports. But, he said, "I do know that I never voted on a death case unless I could honestly say I had read every word that was available in the file."

Boyd said he "never saw any psychological reports and never read any."

"Somebody was smart enough, if those psychological reports were in there, to pull them out before they ever got to me," Boyd said.

Old White, clerk of the Supreme Court, said he had not all of the defendants whose psychological reports were ordered, those later pulled from the files.

"You would have to go through each one of the files to look for a copy of the letter requesting the psychological report, and we have not done that," White said.

Chief Deputy Clerk Services Smilgin said letters requesting the reports were written by several different clerks and signed by White. Smilgin said she could not recall the name of the original clerk who got Overton's request for a report.

"We thought ordering the reports was a pretty set up by the judges. We wouldn't do it on our own. We thought it was what the judges wanted," Smilgin said.

"When Justice Overton told us to stop, we stopped," she added.

Defense attorneys say searching for letters requesting the reports, as White suggested, would not show all cases in which the reports were obtained. Records at the Department of Corrections, spot-checked by The Miami News, show that in some death row cases, psychological reports were read to the court without a written request.

Defense attorneys say they can't uncover the full extent of the practice until they take sworn testimony from the justices, their former law clerks, and deputy clerks.

If the justices should become witnesses, the case could be heard by Florida's appeals court judges from around the state, or even circuit court judges.

Shaw, the former state attorney general, said he thought the attack would be relevant only in cases in which recent psychological reports had actually been read by the justices. "All of the rest of the attacks would be irrelevant," he stated.

"It is unfortunate there are these delays because if the death penalty is going to serve as a deterrent, it must be carried out," Shaw said, pointing out that although Gov. Graham has signed 18 death warrants, all but Spivey's have been stayed by appeals.

Graham signed two death warrants last week, ordering the execution of 25-year-old Leroy McGroves of Island and 36-year-old Carl Ray Sanger of Broward County. McGroves was convicted of killing a state conference room clerk during an armed robbery in 1974; Sanger was convicted of murdering a Florida Highway Patrol trooper in Citrus County in 1973.

Sanger's case file shows that he is one of the condemned men whose recent psychological report was ordered from the Department of Corrections. But the file doesn't show whether the report was ever received.

McGroves's court file contains no indication the psychological report was requested or received.

CERTIFICATE OF SERVICE

I DO CERTIFY that a copy of the Appendices to the Application for Extraordinary Relief and Petition for Writ of Habeas Corpus has been furnished to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32304 by hand delivery this 29th day of September, 1980.

SAMUEL S. JACOBSON
of counsel

59,732

IN THE
SUPREME COURT OF FLORIDA

JOSEPH GREEN BROWN, et al.,)

Petitioners,)

- v. -)

LOUIE L. WAINWRIGHT, Secretary,)
Department of Corrections,)
State of Florida,)

Respondent.)

FILED
CASE NO. SEP 29 1960

NO. 1. 1. 1. 1. 1.
FLORIDA SUPREME COURT
CLERK OF COURT

MOTION FOR REFERENCE OF JOINT PETITION
TO SPECIAL MASTER AND FOR OTHER
APPROPRIATE REMEDIES IN THE EVENT OF
FACTUAL DISPUTE

If the factual allegations of the petition filed contemporaneously with this motion are not admitted, petitioners respectfully move that this Court forthwith enter orders immediately necessary to preserve relevant evidence, and then refer their joint petition to a Special Master for hearing, as described more fully below.

The documents which petitioners present in Appendix B to the petition suggest that there have been serious constitutional violations in this Court's adjudication of capital appeals under Florida's "trifurcated" sentencing system. The complete facts are not known at this time, and petitioners lack both the forum and the compulsory process necessary to develop them. Only this Court can establish the comprehensive and systematic procedures to identify and rectify whatever errors occurred, however inadvertently, in connection with this information.

It is clear that this Court is not the place to resolve disputed factual issues. In Gardner v. Florida,

430 U.S. 349 (1977), the State attached to its brief what was purported to be the "confidential" portion of petitioner Gardner's presentence investigation report that had not been disclosed to defense counsel. The Supreme Court of the United States refused to consider or evaluate this document:

It is not a function of this Court to evaluate in the first instance the possibly prejudicial impact of acts and opinions appearing in a presentence report. We therefore do not consider the contents of the appendix to the State's brief.

Id. at 354-355 n.5. Moreover, the Court made clear in its disposition of Gardner that an evidentiary hearing was necessary before the death sentence could be imposed on petitioner Gardner because many disputed issues had to be resolved by a factfinder concerning the statements in the presentence report. The State had contended that if reversible error had been committed by the non-disclosure of the presentence report, the Supreme Court should remand the case to this Court, and let this Court place the report in the record and then review petitioner Gardner's death sentence on the amended record. The Supreme Court of the United States rejected such a disposition.

In light of the common disclosures and evidence which may be required in an extremely large number of cases -- from the Justices of this Court, court personnel, Department of Corrections employees, Florida Parole and Probation Commission employees and other individuals -- judicial economy and efficiency dictate the appointment of a neutral and detached Special Master to preside over a unitary, adversary fact-finding proceeding. The Special Master should be given an explicit mandate to investigate fully the questions presented in the petition, including, but not limited to, the power to authorize discovery by the

parties, e.g. depositions and interrogatories, and the power to inspect, in the presence of counsel, all records maintained by this Court, the trial courts, Department of Corrections, Florida State Prison, the Florida Parole and Probation Commission, and any other appropriate state agency or office.

It would also then appear, as we must regretfully note, that if this Court refers the joint petition to a Special Master with the capacity to receive testimony, then by the allegations and the nature of this cause the Justices of this Court, because of their direct and unique knowledge of the practices involved, including the alleged destruction of documentary evidence, would be material witnesses with an interest in the outcome of the proceeding, and disqualification would be proper. Under the circumstances present in this cause, disqualification would be appropriate in order for this Court to assure petitioners that they will receive a fair hearing in a fair tribunal -- a basic requirement of due process. In re Murchison, 349 U.S. 133, 136 (1955). Disqualification is needed to avoid even the appearance of impropriety. Fla. Bar Code Jud. Conduct, Canons 2, 3C(1). See Fla. Bar Code Jud. Conduct, Canons 3A(4), 3B(1), 3B(2).

PRAYER FOR RELIEF

Based upon the foregoing, in the event of factual dispute, petitioners respectfully request:

1. that this Court enter its order directing the preservation and maintenance of all files, docket sheets, documents, recordings and other information and material received by, in the possession of, or under the control of this Court pertaining to every capital case filed in this Court since December 1, 1972;

2. that this Court enter its order directing the Division of Archives, History and Records Management,

the Department of Corrections, the Florida Parole and Probation Commission, the judges and clerks of the several judicial circuits of the State of Florida, and any and all other state agencies having access to such files, docket sheets, documents, recordings and other information and material, and the agents and employees thereof, to preserve and maintain intact all files, docket sheets, documents, recordings and other information and material received, in possession of, or under the control of said court or agency pertaining to every capital case filed since December 1, 1972;

3. that this Court enter its order appointing a Special Master to conduct evidentiary proceedings under the conditions described above;

4. that after completion of proceedings by the Special Master, there be a full opportunity for briefing and oral argument on the issues presented herein;

5. that this Court grant its order authorizing the payment of all costs attendant to this proceeding;

6. that this Court grant such further appropriate relief as required by the nature of the proceedings.

Respectfully submitted,

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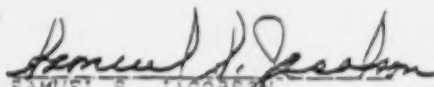
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(2) 69

CERTIFICATE OF SERVICE

I DO CERTIFY that a copy hereof has been furnished to the Honorable Jim Smith, Attorney General, The Capitol, Tallahassee, Florida 32304 by hand delivery this 29th day of September, 1980.


SAMUEL S. JACOBSON
of counsel

| | | |
|--|----|----------------------------|
| JOSEPH GREEN BROWN, ET AL., | ** | |
| Petitioners, | ** | <u>ORDER TO SHOW CAUSE</u> |
| vs. | ** | |
| LOUIE L. WAINWRIGHT, Secretary, Department of Corrections, State of Florida, | ** | CASE NO. 59,732 |
| Respondent. | ** | |

A Petition for Habeas Corpus and Extraordinary Relief having been filed urging the exercise of the original jurisdiction of this Court, the respondent is directed to respond to said petition on or before October 14, 1980. Petitioners may file a reply on or before October 23, 1980.

Consideration of the Motion for Reference of Joint Petition to Special Master and For Other Appropriate Remedies in the Event of Factual Dispute at this time is premature.

The Applications for Stay of Execution presented on behalf of Carl Ray Songer and Lenson Hargrave in connection with this Petition are granted and the executions of Carl Ray Songer and Lenson Hargrave are hereby stayed pending disposition of this Application for Writ of Habeas Corpus.

This case is set for oral argument on Monday, October 27, 1980, at 9:30 a.m. with one hour to the side allowed for oral argument.

SUNDBERG, C.J., BOYD, OVERTON, ENGLAND, ALDERMAN and McDONALD, JJ., Concurring
ADKINS, J., would deny the Petition for Writ of Habeas Corpus and the Applications for Stay of Execution. Alford v. State, 355 So.2d 108 (Fla. 1977), cert. den. 436 U.S. 935 (1978).

/s/ Sid J. White

Clerk of the Supreme Court of Florida.

A True Copy

TEST:

Sid J. White
Clerk Supreme Court

C
cc: Hon. Jim Smith
Samuel S. Jacobson, Esquire
Marvin E. Frankel, Esquire
Joseph Jordan, Esquire
Hon. Bennett H. Brummer
Hon. Michael J. Minerva
Craig S. Barnard, Esquire

IN THE SUPREME COURT OF FLORIDA

| | | |
|------------------------------|---|------------------|
| JOSEPH GREEN BROWN, ET AL., | 1 | |
| Petitioners, | 1 | |
| -vs- | 1 | Case No. 59, 732 |
| LOUIE WAINWRIGHT, Secretary, | 1 | |
| Department of Corrections, | 1 | |
| State of Florida, | 1 | |
| Respondents. | 1 | |
| <hr/> | | |

MOTION TO DISMISS

COME NOW Respondents pursuant to Fla.R.App.P. 9.300 and move to dismiss the Petition filed in the above-styled cause for the following reasons.

I.

The Petition fails to state a legal basis upon which relief can or should be granted.

II.

Either in pursuance of Chapter 79, Fla.Stat., the rules of this Court appertaining thereunto or any cases dealing with petitions for writ of habeas corpus and the requisites therefore, the Petition herein is woefully lacking either in factual allegations or any other particulars deemed necessary as a matter of law.

Petitioners present five grounds upon which they argue collectively they are entitled to relief. Specifically, Petitioners

argue that they were denied due process rights to fair capital review procedures in that this Court requested and received information de hors the record in violation of Gardner v. Florida, 430 U.S. 349, (1977); denied the right to effective assistance of counsel; denied the right to confrontation; denied their Eighth Amendment right to proportionality in capital sentencing in violation of Proffitt v. Florida, 428 U.S. 242 (1976) and denied their right against self-incrimination and the right of the assistance of counsel in deciding whether to exercise their right contrary to Smith v. Estelle, 602 F.2d 694 (5th Cir. 1979) cert. granted 100 S.Ct. 1311 (1980).

Respondents would submit that as to Petitioners' claims that they were denied due process; denied effective of counsel, denied the right to confrontation; denied the Eighth Amendment right to reliability in capital sentencing and denied the rights against self-incrimination and the right of assistance of counsel in deciding whether to exercise that right; Petitioners have failed to individually allege facts which, if true, would entitle them to relief. Each of the above noted rights allegedly denied the Petitioners sub judice, are individual rights which must be exercised by the offended party rather than vicariously through the rights of a third party. In Rakas v. Illinois, 439 U.S. 128 at 139 (1978), the United States Supreme Court expounded upon the particular rights of the Fourth and Fifth Amendments.

It should be emphasized that nothing we say here casts the least doubt upon cases which recognize that, as a general proposition, the issue of standing involves two inquiries; First, whether the proponent of a particular legal right has alleged "injury in fact," second, whether the proponent is asserting his own legal rights and interest rather than basing his claim for relief upon the rights of third parties.

The Court in Footnote 8 further observed:

This approach is consonant with that which the court already has taken with respect to the Fifth Amendment privilege against self-incrimination, which also is a purely personal right.

[Id. at 140]

See, also, United States v. White, 322 U.S. 694 (1944); Data Processing Service v. Camp, 397 U.S. 150 (1970). Fisher v. United States, 426 U.S. 319 (1976) and Rawlings v. Kentucky, ___ U.S. ___, 65 L.Ed.2d 633 (1980).

Respondents would submit that as to Petitioners' complaints that their rights have been violated, violations which might have occurred against a few cannot be said to have permeated every Petitioner's case where no factual allegations individually have been made to demonstrate same. Where the particular right is an individual right which must be exercised, Rakas v. Illinois, supra, particular and individual allegations of facts must be set forth before entitlement to a hearing or other relief under habeas corpus proceedings may be granted. In short, there are no allegations of fact by any particular petitioner to show his constitutional rights were violated, which is essential to habeas corpus relief.

The burden is the individual Petitioner's to come forth with sufficient allegations which would entitle him, based on his particular circumstances, to relief. State ex rel Recio v. Simpson, 10 So.2d 909 (Fla. 1942); Ex Parte Stoddard, 34 So.2d 92 (Fla. 1948). Therefore, without factual circumstances being alleged on an individual level, this Court has nothing before it to enable it to pass upon the Fifth, Sixth, Eighth, and Fourteenth Amendment claims raised in unison by Petitioners.

The sole legal issue before this Court and the actual gravamen of the Petition is the question found in subsection (e) of the Petition, to-wit: whether the Eighth Amendment right to proportionality in capital sentencing has been violated. Petitioners assert that:

The constitutionality of Florida's capital punishment statute was upheld in 1976, on the explicit assumption that review in this Court would be satisfactory to guard against capricious and disproportionate imposition of the death penalty.

[Petitioner's Petition - 9]

Petitioners now assert that:

The receipt of this Court of different information in different cases--information which was not before the trial jury or judge--has eviscerated the system of checks and balances the trifurcated Florida death penalty structure was designed to guarantee.

[Petitioner's Petition - 11]

In essence, Petitioners argue that because of alleged violation in a few cases, which are unspecified and unidentified herein, the entire system has been infected and proportionality in sentencing is no longer plausible in the capital sentencing structure.

The court's practice thus has prejudiced all capital appellants, both those for whom information may have been received and those whom it has not.

[Petitioner's Petition - 11]

Petitioners liken the alleged receipt by this Court of information not available to the trial judge and jury a violation of Gardner v. Florida, supra. In essence, Petitioners are expanding the concept of Gardner to appellate review. Respondents would submit that assuming for the moment that the Florida Supreme Court has received information not made available to the trial court and jury, Petitioners or the State, and assuming Gardner v. State, supra, applies to appellate review of proceedings, a violation in a few cases does not mean the entire trifurcated capital punishment structure collapses and all death sentences are invalid. In the very decision that the Petitioners are relying on, to-wit: Gardner v. Florida, supra, the United States Supreme Court did not throw out the capital sentencing statutes, but rather vacated and remanded the case for further disposition by the Florida Supreme Court. Specifically, the Court noted:

There remains only the question of what disposition is now proper. Petitioner's conviction of course is not tainted by the error in the sentencing procedure. The State argues that we should merely remand the case to the Florida Supreme Court with directions

to have the entire Pre-Sentence Report made part of the record to enable that Court to complete its reviewing functions. That procedure, however, could not fully correct that full disclosure, followed by explanation or argument by defense counsel, would have caused the trial judge to accept the jury's advisory verdict. Accordingly, the death sentence is vacated and the case is remanded to the Florida Supreme Court with directions to order further proceedings at the trial court level not inconsistent with this opinion.

[430 U.S. 362]

Indeed, this very Court, following the decision in Gardner v. Florida, supra, attempted to correct any Gardner violations in post-Gardner cases by ordering the trial courts of this state in capital cases to respond as to whether Pre-Sentence Investigations were utilized and not made available to given defendants. Many of the Petitioners in this Petition received the benefit of this Court's actions. Similarly, a like result could and should obtain in the case at bar where those Petitioners aggrieved by the alleged activities of this Court can demonstrate that in their particular and individual case, the appellate application of Gardner v. Florida, supra, is a viable complaint.

Thus, the gravamen of the Petitioners' complaint herein and the sole legal issue before this Court must be dismissed for failing to state a valid complaint entitling all the Petitioners to relief.

In Godfrey v. Georgia, 64 L.Ed.2d 398, the United States Supreme Court reversed Godfrey's death sentence and remanded the case for further disposition. The court held:

Thus, the validity of Petitioner's death sentences turn on whether, in light of the facts and circumstances of the murders that Godfrey was convicted of committing, the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible, or inhuman in that (they) involved . . . depravity of mind . . ." We conclude

that the answer must be no. The Petitioner's crimes cannot be said to have reflected a consciousness materially more depraved than any person guilty of murder.

[Id. at 409]

The United States Supreme Court did not strike down the Georgia death penalty statute and all Georgia death sentences, but rather vacated the death sentence and remanded for further disposition. See, also, Presnell v. Georgia, 439 U.S. 14 (1978).

Assuming for the moment that a few of the Petitioners may have a legitimate claim against the reviewing practices of the Florida Supreme Court, this particular contention must fail as a matter of law because there has been no showing nor case authority provided which would support these Petitioners' contention that proportionality in imposing or affirming death sentences has been precluded. See, Spinkellink v. Wainwright, 578 F.2d 582 at 613 (5th Cir. 1978) and Meeks v. State, 382 So.2d 673 (Fla. 1980).

III.

Petitioners argue that they have filed jointly in an interest of judicial economy because of the common issues of law and fact presented citing to In re Baker, 267 So.2d 331 (Fla. 1972). In In re Baker, *supra*, this Court, following the decision in Furman v. Georgia, 408 U.S. 238 (1972) recognized the need to collectively vacate the sentences of those persons on death row following the fall of the capital punishment structure at that time. That action was in direct response to the United States Supreme Court's striking down capital punishment throughout the country, not just in Florida. To require each of those individuals on death row in 1972 to individually litigate whether they should be on death row would have been ridiculous. Furman v. Georgia, *supra*, went to the heart of capital punishment and struck it down. In the case at bar, all of these Petitioners on death row in 1980, challenge the efficacy of proportionality review and complain about personal rights which cannot be exercised vicariously. In essence, the complaints herein are both factually and legally wanting, do not go to the very heart of the capital punishment structure, but merely attempt to collectively make their petition whole in spite of the fact that the sum of the parts does not reach that result. The only common thread running through this Petition is the fact that each Petitioner has challenged the status of proportionality in Florida's capital punishment statute. That issue, as a matter of law, must fail, and thus, the common cause which unites Petitioners in In re Baker, *supra*, does not exist here.

CONCLUSION


Respondents would respectfully urge this Court to grant their Motion to Dismiss the instant Petition in that Petitioners' complaints which allege personal violations of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution are devoid of factual allegations sufficient to support the Petitioners' bald complaints that their rights have been violated. Rakas v. Illinois, supra. In regard to the only legal issue before this Court, to-wit: whether Florida still has proportionality review of the imposition of death sentences, Petitioners have failed to make out a claim as a matter of law which would entitle them to relief. Petitioners have failed to make a prima facie showing that their death sentences which were affirmed by this Court or are pending on review, have been tainted by an alleged appellate Gardner violation which may have occurred in a few unspecified and unidentified cases.


WHEREFORE, Respondents would respectfully urge this Court grant Respondents' Motion to Dismiss.

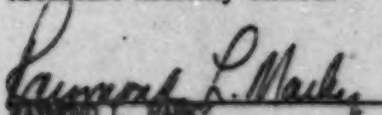
Respectfully submitted:

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By


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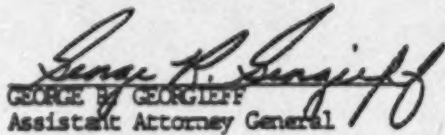

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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished SAMUEL S. JACOBSON, ESQUIRE, of Datz, Jacobson, and Lambcke, Suite 2902, Independent Square, Jacksonville, Florida, 32202, by United States mail on this 14th day of October, 1980.


GEORGE B. GEORGIUFF
Assistant Attorney General

Of Counsel

THE SUPREME COURT OF FLORIDA
TALLAHASSEE, FLORIDA

JOSEPH GREEN BROWN, et al.,

Petitioners,

-vs-

LOUIE L. WAINWRIGHT, SECRETARY,
DEPARTMENT OF CORRECTIONS,
STATE OF FLORIDA,

Respondents.

:
:
:
:
:
: CASE NO. 59,732
:
:

PROCEEDINGS:

ORAL ARGUMENT

BEFORE:

THE SUPREME COURT OF FLORIDA

DATE:

Monday, October 27, 1980

TIME:

Commenced at 9:30 A.M.
Terminated at 11:20 A.M.

PLACE:

Supreme Court Building
Tallahassee, Florida

REPORTED BY:

CATHY HARDEN, CP, CSR, RPR
Official Court Reporter

CATHY HARDEN, CP, CSR, RPR

OFFICIAL COURT REPORTER
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PROCEEDINGS

CHIEF JUSTICE SUNDBERG: Good morning, ladies and gentlemen. We will convene this morning. We're here on the case of Brown versus Wainwright.

Is Counsel for the Petitioners ready to proceed?

MR. FRANKEL: Ready, Your Honor.

CHIEF JUSTICE SUNDBERG: Please proceed, sir.

MR. FRANKEL: May it please the Court, this application for extraordinary relief and petition for writ of habeas corpus on behalf of 123 petitioners on death row raises fundamental problems that have emerged or appear to have emerged from this Court's efforts to administer its grave responsibility for reviewing every death sentence passed in the state of Florida. From the -- at this point -- undisputed allegations of our application, it appears that these problems arise from the Court's understandable effort to be fully informed about the relevant facts and possibly relevant opinions before it makes its final and independent decision as to who may live and who must die.

The difficulty that has been disclosed as a result of that effort to learn all the possible facts is that it appears to have come to pass that through requests emanating from this courthouse, and perhaps

1 in other ways, there has come to be placed in the
2 record of this Court in connection with appeals in
3 capital cases important data, information, opinions
4 placed in the Court without notice of those deliveries
5 of information to the appellants or to their lawyers.

6 In this state of affairs, the Appellants and
7 their lawyers have been deprived of the basic oppor-
8 tunity to consider the materials being used in their
9 cases, to assist -- in the case of the lawyers -- to
10 assist their clients and the Court in understanding,
11 evaluating and weighing these materials.

12 The result of that course of events in our
13 respective submission on this application has been an
14 array of serious violations of the Constitution of this
15 state and the Constitution of the United States. The
16 kinds of materials to which we refer, and on which
17 this petition is made, are outlined in the papers, but
18 their nature and their extent are matters of importance.
19 And I think it's appropriate to take a minute to
20 enumerate the items which our incomplete understanding
21 reveals to have been placed in this Court.

22 They include psychiatric evaluations of the
23 capital Appellants. They include psychiatric contact
24 notes, all made by people on this gravest of subjects
25 with respect to capital defendants who are not present,

1 of course, to be examined or cross-examined; and, more
2 gravely still, all delivered into the courthouse
3 without the knowledge of the Appellants or their
4 lawyers and without any opportunity for them to see
5 these materials and consider them with the Supreme
6 Court.

7 The materials include similarly psychological
8 screening reports of which the same observations could
9 be made. They include presentence investigation
10 reports, both on the capital crime and, in a number of
11 instances, on crimes other than the one which is the
12 subject of the appeal to this Court.

13 Even when they relate to the capital crime in
14 question, these reports in a number of instances
15 appear to have been delivered to this Court without
16 the knowledge of Counsel that they were here, and in
17 cases where they were no part of the stated record
18 before the Court on the appeal.

19 They include in one or more instances reports
20 to the Court of the capital Appellants' refusal to
21 participate in the procedure for a psychiatric
22 evaluation. They include parole reports, reports of
23 violations and other investigations.

24 In one instance known, and perhaps in others,
25 a Federal presentence report was sent to this Court in

1 connection with one of these appeals. And without
2 enumerating necessarily everything that's indicated in
3 the Appendix to the petition, I mention also state
4 prison classification and admissions summaries.

5 JUSTICE ENGLAND: Mr. Frankel, let me ask you
6 to pause there because that, I think in part, goes to
7 the heart of what you are about.

8 The last three things you mentioned:
9 Recitations -- one of them was recitations of a
10 Defendant's refusal to submit to a psychiatric
11 evaluation. Do you mean the Robert Fieldmore Lewis
12 case, Page 66 of your transcript?

13 MR. FRANKEL: Yes, Your Honor, I do. ⁸⁸

14 JUSTICE ENGLAND: Is there any other besides
15 that?

16 MR. FRANKEL: Well, there is no other that we
17 know of at this time, Your Honor.

18 JUSTICE ENGLAND: Probation and parole violation
19 reports; do you refer there to Valle, Page 109, and
20 Drake, Page 111 of your Appendix, or are there others
21 that I have overlooked?

22 MR. FRANKEL: Your Honor, I think those are all.

23 JUSTICE ENGLAND: With regard to prison classi-
24 fications and admission summaries, I take it you mean
25 Thomas, Page 82 of your Appendix; are there any others?

1 MR. FRANKEL: Your Honor, I am not certain, but
2 I think there is a case of a Ferguson that's in that
3 category. Let me say, generally, Your Honor, if I
4 may, in answer to this question --

5 JUSTICE ENGLAND: I haven't asked the question.

6 MR. FRANKEL: -- that we have had the most
7 limited kind of exploration to uncover the facts about
8 these assertions. We think, as I will be urging on
9 the Court, that enough has been shown to demonstrate a
10 grave and probably fatal defect in the process.

11 But, if there were issues of fact about how
12 many, and if that matters with respect to each
13 category, as a supplemental motion we've made indicates
14 we need to explore those situations, explore the
15 files and other things to find out.

16 JUSTICE ENGLAND: Yes, I understand that to be
17 the thrust of what you are saying. My point in
18 raising this was -- and I don't know about Ferguson.
19 I will have to check that. I have been through your
20 Appendix and I thought that these were the ones that
21 you were referring to in these categories.

22 The Lewis letter, on Page 76, volunteers wholly
23 unsolicited from this Court that a denial of testing
24 was made by Robert Fieldmore Lewis on the advice of
25 counsel.

1 As I read the Thomas letter on Page 82, it
2 doesn't say that a prison admission summary is being
3 sent to the Court, but it says that was an excuse for
4 their not sending another document that was requested
5 from the Department of Corrections.

6 As I read Valle's document, there was a
7 violation report prepared and sent to us in lieu of a
8 presentence investigation because we had asked for
9 that.

10 As I read Drake's, } the only letter I see there
11 says that he violated parole by committing the murder
12 with which he was charged, and that was in evidence
13 before the trial.

14 Now, my question on that is, if these are the
15 only documents that support those three allegations,
16 which are at the beginning of the opinion and which
17 you characterize as very grave mistakes by this Court--
18 which have been picked up and widely broadcast by
19 the media, and have in fact affected the perspective
20 of the process of this Court -- if these are the three
21 things that you rely on for those allegations, do you
22 think those were fair bases for those? Were they made
23 in good faith?

24 MR. FRANKEL: Your Honor, we think the allega-
25 tions of this petition are fair and that an appreciation

1 of their scope, their gravity and their fairness
2 requires addressing all of them. The ones Your Honor
3 mentioned with deference are toward the end of my list.
4 The list began with materials that I believe are much
5 more dramatic and much more troublesome. Psychiatric--

6 JUSTICE ENGLAND: That may be. It's on Page 2
7 of your petition, and it's a list --

8 MR. FRANKEL: Pardon?

9 JUSTICE ENGLAND: It's on Page 2 of your
10 petition, and it is a list that has no separation,
11 six items put together. Are you now telling me that
12 three are inconsequential?

13 MR. FRANKEL: No, Your Honor, I am not telling
14 you that. I am saying that as in many other instances
15 in the law, it is the accumulation of circumstances
16 that must be considered in appraising the weight and
17 the gravity of what's being claimed. And I am saying--
18 and this is one of the purposes, I take it, of
19 conversations with the Court in the nature of oral
20 argument--that if we must analyze these materials, I
21 would say that their relative significance and their
22 relative gravity, though I withdraw none of them,
23 varies from item to item. And what we have alleged,
24 for example, is a substantial number already
25 discovered without knowledge of what else might be

1 discovered if issues of fact really arise about this,
2 a substantial number of psychiatric evaluation reports.

3 What we have shown in this Appendix with respect
4 to the unfortunate and undoubtedly well intended
5 ex parte character of these submissions includes, for
6 example, in several cases situations like this where,
7 on the same day, there issues out of this Court a
8 request for a copy of the presentence report and a
9 copy of that request goes to defense counsel.

10 On that same day, there issues out of this Court,
11 with respect to the same Appellant, a request for a
12 psychiatric evaluation and no copy to defense counsel
13 of that request.

14 Now, I started out by saying because on behalf
15 of all these lawyers, I mean to say that our best
16 understanding of how this situation arose is that it
17 stems from what we -- without wishing to be
18 presumptuous -- view as a probably commendable desire
19 in a court saddled with the grim responsibility to
20 leave no stone unturned in acquiring accurate informa-
21 tion about the solemn problem of deciding who should
22 be executed and who should be sent to prison for life.

23 So, as to the problems of motivation, we think
24 they're not important. We think if they were, we
25 would have every reason to feel that the motivations

1 are humane and positive.

2 What we complain about is the result of these
3 efforts as nearly as we can reconstruct their origin
4 and their nature. And what we say is that whatever
5 the reason and the cause and the occasion for these
6 ex parte communications in pending cases, whatever the
7 reason for that, it is a violation of the most
8 fundamental notions of fairness in our system of
9 adversary justice. It's a violation of the most
10 elementary kinds of protections that a litigant in any
11 case is entitled to expect from any court, from any
12 judge, at any stage of any proceeding.

13 JUSTICE ENGLAND: Mr. Frankel, I know you are
14 going to want to get into an argument on each of the
15 legal bases that you assert. But, to help me again
16 understand the thrust of where you are going and what
17 conclusions you draw, the petition appears to cover a
18 number of people whose sentences were imposed by a
19 trial court but are now pending on review here. I'm
20 not exactly certain what relief you request or what you
21 seek as to those. There certainly is no action yet by
22 this Court.

23 What is it precisely that you would have us do?
24 Is it that you want a new court to replace this one
25 in considering the appeals of those Defendants

1 because of the overall skewing that has taken place in
2 our processes from 1965?

3 MR. FRANKEL: Your Honor, our broadest submission,
4 as I will state it now and elaborate it at the
5 Court's pleasure, is that the practice of which these
6 Petitioners complain, however it evolved, discloses
7 defects so pervasive and so fatal in the capital
8 system, capital sentencing system of this state as to
9 invalidate that system and to invalidate the statute
10 under which these sentences are imposed. We urge and
11 press that submission. Obviously, in the course of
12 this argument, subject to the Court's interests and
13 questions, other possibilities will be explored.

14 But, the answer to Your Honor's question is that
15 if we are right, as we believe, if the system of
16 appeals has been seriously infected and invalidated,
17 then it serves the interests of this Court, as well as
18 the Appellants whose cases are pending here, to press
19 that point in their cases as well as those of others
20 whose appeals have already been decided.

21 How broadly this cuts and what its consequences
22 may be, are, of course, matters submitted for the
23 Court's judgment. But, it seemed to us in formulating
24 this position, that its breadth and its basic
25 character required us to lay it before the Court with

1 respect to all the cases potentially affected. And
2 that includes, in our judgment, those that are here
3 or in some way pending in this Court.

4 JUSTICE ENGLAND: I'm not sure I still follow you.
5 You want to lay before us the argument in those
6 pending cases. Do you want us to vacate death
7 sentences imposed by the trial court for an error
8 which has not yet occurred here in those cases?

9 MR. FRANKEL: Your Honor, we do, if we're right--
10 if we're right that the course in which the Court
11 finds itself to which it has been driven in
12 administering this statute, if we're right in saying
13 that that course lays bare the invalidity of that
14 statute, then we would claim nobody can be sentenced
15 to death under it.

16 JUSTICE ENGLAND: So, it is not this Court
17 which is tainted, because you are not asking for a
18 substitute court who has never been through a process
19 of reviewing something they shouldn't have; you are
20 not asking to replace us as individuals with another
21 Supreme Court. You are saying that no Supreme Court
22 can now properly approve a death sentence because of
23 what we did; is that right?

24 MR. FRANKEL: We are saying that, Your Honor; we
25 are saying a number of other things depending on --

1 JUSTICE ENGLAND: No, what I mean --

2 MR. FRANKEL: -- how this Court -- yes, sir.

3 In order to give you a complete answer, among the
4 things we say are if the State and the Court should
5 find that any of the factual presentations we make
6 require evidentiary exploration, we're saying that
7 this Court with all respect should recuse itself
8 because the actions or non-actions of the Justices of
9 the Court are drawn into question and Justices of the
10 Court might well, however delicately that would have
11 to be handled, might well be called to testify as to
12 how these matters were conducted. In that situation,
13 we would say the Court would be disqualified to sit.

14 If the statute is as we submit invalid and
15 unconstitutional because of the necessities it has
16 permitted or led to, then, of course, all levels of
17 proceedings under the statute are invalidated and no
18 death sentence can stand.

19 JUSTICE ENGLAND: You have to help me because
20 there is a leap in there I still don't understand.
21 If we have erred in our process and if, hypothetically,
22 all existing affirmed death sentences are invalid
23 because we skewed the process in some cases, the
24 proportionality requirement requires that all that we
25 have considered must be thrown out, why does that

1 prevent a new court of another seven people from
2 starting over and applying the statute which the
3 United States Supreme Court has said is valid?

4 MR. FRANKEL: Your Honor, the United States
5 Supreme Court said that the statute Your Honors have
6 tried so hard to administer was valid in part as a
7 result of certain repairs and improvements that this
8 Court had made, as is its right, in construing that
9 statute. A Supreme Court that was not undivided
10 accepted those administrative additions, judicial
11 administrative additions as answering any objections
12 based on the difference between Florida statute, say,
13 and that of Georgia.

14 There was a certain assumption of judicial
15 facts underlying the Proffitt decision that led to the
16 sustaining of the statute.

17 In the fullness of time, if we're right in our
18 fact and in our law, it has come to be seen that the
19 statute doesn't work right, that apart from the
20 relatively, relatively minor omissions from the
21 statute that worry the Supreme Court but that it
22 finally found supplied by this Court -- Dixon and
23 other decisions -- we now discover that this Court
24 behaving responsibly appears to have found it
25 necessary over and over again to fill gaps in this

1 statute by dealing in ex parte information.

2 We presume that the Court and we believe that
3 the Court, apart from lawyers' presumptions, has under-
4 taken to do its job the best way it could to make the
5 statute work the best way it could. And our position
6 is that the statute doesn't work. A statute that
7 permits or requires this profound violation of the
8 most basic rights of litigants, rights that litigants
9 have in promissory note cases, can't be an adequate
10 statute for determining who should be sentenced to
11 die at the hands of the State.

12 CHIEF JUSTICE SUNDBERG: Mr. Frankel, you're
13 suggesting -- the bottom premise here is that this is
14 in the nature of a Gardner violation.

15 MR. FRANKEL: It is one of our bottom premises,
16 yes, Your Honor.

17 CHIEF JUSTICE SUNDBERG: Well, why did the same
18 conclusion not flow from the fact that there were
19 Gardner violations at the trial court where there has
20 been resentencing by the same trial judge?

21 MR. FRANKEL: Your Honor, the violation here is
22 a Gardner type of violation, but its implications and
23 its ramifications, because we're dealing, however
24 regrettably, with the Supreme Court of the State of
25 Florida are much broader, much deeper than the problems

1 of trial judges exploiting Gardner. Let me --

2 CHIEF JUSTICE SUNDBERG: Pardon me just a
3 moment so you can explore this with me. Why is the
4 implication greater in this Court's review of a
5 sentence than the implication where a trial judge is
6 in fact imposing a sentence? Two different functions.

7 MR. FRANKEL: Let me try to answer that, Your
8 Honor. The role of this Court, as I need not remind
9 Your Honor, in the determination that Florida had a
10 valid capital sentencing statute, the role of this
11 Court was central and critical. And its role was to
12 see to it that the rules and the standards for
13 imposing death sentences were fair, reliable,
14 consistent, proportional -- all those things.

15 This Court supplies the guidelines and supplies
16 the regulatory machinery for making sure that capital
17 punishment is not imposed arbitrarily and capriciously.

18 CHIEF JUSTICE SUNDBERG: Generally, as a matter
19 of law.

20 MR. FRANKEL: Generally, as a matter of law.
21 And what the law is, is inseparably related in this
22 field, as in so many others, Your Honor, with what
23 factual things are material. After all, the way the
24 law evolved was by judges, in case after case, deciding
25 what facts made a difference about what. And from

1 that, in our peculiar system, we inferred rules of
2 law, at least when we were mostly a common law society.

3 Now, what this Court, in our view, has
4 demonstrated is that in order to make the system work
5 fairly, it was required to deal in a way that in
6 retrospect and in the large turns out to be haphazard
7 and, to put a point on it, arbitrary in its function.
8 That is to say, take any given case where a record has
9 been made in the trial court -- Gardner teaches us that

10 the record on appeal should not be different from
11 the record on which the trial judge decided. It should
12 not be less. We say a fortiori, it should not be more;
13 and that for very critical reasons. When this Court--

14 JUSTICE ADKINS: Pardon me while I interrupt
15 you there. Your statement that it should not be more.
16 That, of course, is fundamental principles of law. In
17 this part of your argument, if you will, please
18 consider the case of Alvord; are you familiar with
19 that, where we were confronted with the situation
20 where the trial judge in imposing sentence was aware
21 of certain matters. And we pointed out the distinc-
22 tion in that case between being aware of something and
23 considering something.

24 And we said in the opinion that a trial judge,
25 in performance of his judicial duties, could well

1 be aware of something, but it does not necessarily
2 invalidate the sentence because it appears that he
3 didn't consider it. Now, that was at the trial level.
4 That case went to the United States Supreme Court.
5 And it was a dissenting opinion which set out the
6 other view, but the majority of the United States
7 Supreme Court denied cert.

8 Now, my query is: On the motion to dismiss, we,
9 of course, accept everything you said in your petition
10 as being true. And even accepting that and assuming
11 that there was something in the record at our level
12 that was not in the record at the trial level, why
13 shouldn't that same principle be applicable to us on
14 review as it was in the Alvord case where the trial
15 judge was involved?

16 MR. FRANKEL: Your Honor, first -- and one is
17 driven to repeat that all these things are said with
18 special deference -- first, the question of what
19 happened with these ex parte materials in this court-
20 house is at some stage question of fact. We have been
21 assured -- I, coming in from the outside, reading the
22 materials and learning from the lawyers involved, the
23 Bar has been assured, death sentence appellants have
24 been assured that the Justices of this Court read all of
25 the files in death cases. Where ex parte materials

1 have found their way into those files, we are expected
2 and entitled to presume that those portions of the
3 files have been read. It is a deep question of fact
4 whether any judge reading a psychiatric evaluation in
5 a death case would merely be aware of it and not
6 consider it.

7 And it's important, Your Honor, to have in mind
8 at this point that because of the unequal situation we
9 have here, where it appears that in some cases
10 psychiatric evaluations are obtained and read and in
11 some cases not, this problem may cut more deeply as a
12 result of the cases where Your Honors may have read
13 psychiatric evaluations and set aside death sentences
14 than it does in cases where ex parte materials have
15 been read in connection with affirmances of death
16 sentences.

17 And let me say why: If -- if by its conduct the
18 Court has shown or maybe inferred to have shown that
19 a psychiatric evaluation made after a man goes to
20 prison is a material item of information in connection
21 with the death sentence that may lead to a reversal
22 and a life sentence, then, depending on what we
23 finally learn are the facts and what the Court finally
24 tells us are the facts.

25 JUSTICE ADKINS: Let me ask you one other

1 question. Assuming all of that to be true -- I under-
2 stand that you are talking about the effect, that the
3 inability of the Court to be aware of something without
4 considering it. That's fundamentally what you are
5 arguing.

6 MR. FRANKEL: I'm saying more than that, Your
7 Honor. I am saying that you may all unintentionally
8 have done worse injury to the people with respect to
9 whom no ex parte evidence was considered than was done
10 to those where it was considered or where the Court
11 was aware of it because what the Bar was not aware of
12 was that in effectively representing these Appellants,
13 it was appropriate, desirable and useful to get these
14 psychiatric evaluations before the Court because they
15 might help.

16 JUSTICE OVERTON: Let me ask you this. What's
17 different between those cases where there is a pre-
18 sentence investigation report and those cases where
19 there has been no presentence investigation report,
20 which this Court has approved as far as the matter that
21 it's discretionary with the trial judge whether or not
22 he orders a presentence investigation report? Now,
23 there are cases that have it and there are cases that
24 do not have it properly.

25 Now, as I understand your argument, is the fact

1 that if one case has a presentence investigation
2 report, then all cases must have a presentence investi-
3 gation report; am I correct?

4 MR. FRANKEL: No, Your Honor, not necessarily.
5 We are not saying that. We're saying that where this
6 Court, the ultimate voice of the State on this
7 question, says something is appropriate, necessary,
8 desirable to consider in connection with a case and
9 where this Court apparently has done that ex parte,
10 so that nobody could know what was material, so that
11 lawyers to that extent functioned in the dark in
12 collecting the materials with which to represent their
13 clients, we say that the whole process has been
14 infected because of the failure to give the guidance
15 and exercise the control and impose the consistency,
16 the uniformity, the rationality, the proportionality
17 that's the key function of the highest court of this
18 state if its statute could be held valid. That's what
19 we're saying at this point.

20 CHIEF JUSTICE SUNDBERG: Mr. Frankel, this is
21 why -- if I may interrupt -- it gets down to what
22 really baseline the function of this Court is. You
23 used the phrase that we make the final independent
24 decision as to who may live and who may die. Is that
25 an accurate statement? That statement implies that we

1 impose sentence. And that's why I asked you earlier
2 isn't there a difference in function between the
3 trial judge? Under our statute it's the function of the
4 jury to make a recommendation, it's the function of
5 the trial judge to impose sentence; it's the function
6 of this Court to review sentence, not to impose it.

7 MR. FRANKEL: Your Honor, let me -- to coin a
8 phrase -- assume arguendo that that's all this Court's
9 function is. And in two minutes I am going to say I
10 think the function is more than that based on what the
11 Court has told the world. Let's suppose that the only
12 function of this Court for the moment is reviewing
13 death sentences. Now, what does it mean to be the
14 court of last resort? It means to be the law-making
15 and the law-giving tribunal for that purpose.

16 Now, how do lawyers and lower court judges know
17 what the law is? Well, we all know about that. We
18 read the appellate court decisions. We read the
19 opinions and we were taught that it's not just the
20 bland statement of legal conclusions but the facts
21 that the court treats as material that we have to look
22 at in order to know what the law is.

23 Now, what emerges in that respect alone from
24 this Court's function, this Court may have evolved --
25 we can't be sure -- in a somewhat chancy and

1 happenstantial way a rule that one of the material
2 items to be considered in connection with a death case
3 is a post-sentencing psychiatric evaluation.

4 CHIEF JUSTICE SUNDBERG: Fine. You're suggesting
5 then that this Court simply does not articulate all
6 the facts or all the reasoning upon which it makes
7 rules of law?

8 MR. FRANKEL: Well, I am suggesting, Your Honor,
9 with respect much more than that because the whole
10 system, the whole system collapses all across the
11 board if beyond failures of articulation, which happen
12 to human beings, even judges, beyond that, the
13 tribunal looks at undisclosed facts that affect its
14 judgment and doesn't tell anybody about that.

15 Now, one of the basic canons of judicial conduct
16 before you get to the Constitution is that in any kind
17 of case no judge will initiate or receive ex parte
18 communications.

19 JUSTICE ENGLAND: Well, Mr. Frankel, let me see
20 where that takes you. I am told that the Tallahassee
21 Democrat, a newspaper in this city, produced a series
22 of articles summarizing a book about Theodore Bundy's
23 trials. I, or my wife, we are subscribers to the
24 Tallahassee Democrat. If I understand what you are
25 saying, by not articulating or notifying Counsel that I

1 received that newspaper, I am ex parte receiving
2 information about a trial of a pending appeal or two,
3 in this Court which has so skewed, tainted, violated
4 the constitutional principles governing review, that I
5 cannot sit fairly and pass sentence -- review sentence?

6 MR. FRANKEL: Well, Your Honor, with respect,
7 that's not quite what I am saying.

8 JUSTICE ENGLAND: But, that is what your words
9 have said because you said that we have considered
10 matters which nobody knew about relevant -- I assume
11 relevant -- and material to the process, and that
12 alone has thrown this statute out of kilter.

13 MR. FRANKEL: Your Honor, I obviously made
14 unfortunate use of the language because I mean to say
15 much more than that. If this Court sits in a case
16 involving General Motors, a civil case, breach of
17 contract case, and its members from time to time have
18 read Fortune Magazine or the Tallahassee Democrat or
19 anything else about General Motors, nobody complains
20 about that. For one thing, lawyers who are alive and
21 well and literate are probably aware that among the
22 items of literature that float around in the world,
23 that judges, like ordinary human beings, may have
24 read are these newspaper things, magazine things and
25 so on.

1 CHIEF JUSTICE SUNDBERG: Law Review articles.

2 MR. FRANKEL: Law Review articles. And they may
3 cope with that publicly familiar information. But, if
4 in the General Motors case, Your Honor, the Court sent
5 for an inquiry made about General Motors that bore on
6 this particular breach of contract or even if the
7 Court sent for so bland a thing as a Dunn and
8 Bradstreet and didn't tell anybody about it in
9 connection with that very case, I think the Bar would
10 rise up in outrage. Judges don't do that ex parte.
11 Now, the judge might say --

12 JUSTICE ENGLAND: That goes to violation of the
13 code of judicial conduct and to behavior. That
14 doesn't go to the material, because I am postulating--
15 and I don't know -- but I am postulating that in that
16 material of the trial there may have been some
17 discussion in the Tallahassee Democrat of legal
18 material not admitted into the record of those trials,
19 and yet we're supposed to sit here and review the
20 record, as you said, unsupported by outside material,
21 not added to or subtracted from. Isn't the principle
22 the same?

23 MR. FRANKEL: No, Your Honor, it's not. The
24 due process clause in both your Constitution, which
25 Your Honors know better, and in the Federal

1 Constitution that governs us all is addressed to
2 flesh and blood human beings living in the real world.
3 And when we consider a case like Gardner which said
4 the trial judge should not look at a confidential
5 presentence investigation statement or statements, I
6 don't think anybody would read that case, Your Honor,
7 to say that that trial judge, if it happened to be in
8 the Bundy case, would be disqualified because he had
9 read the newspaper. I just think there is an enormous
10 difference between those two kinds of information.

11 JUSTICE ENGLAND: Okay. But, let me ask a
12 follow-up to Justice Sundberg's question. Is the
13 United States Supreme Court's review function in capital
14 cases any different from ours?

15 MR. FRANKEL: Yes, Your Honor. I do think the
16 function is different. I think the function of this
17 Court is broader, more critical to the sustaining of
18 the statute if it could be sustained, and more nearly,
19 more nearly on the Court's own statements, de novo.
20 This Court has talked of making an independent judgment
21 in sentencing. It's talked of the vital importance of
22 facts, of its careful review of the record.

23 Now, I don't think the Court has used -- so far
24 as I know -- the standard corpus juris expression
25 "de novo." I don't claim -- we don't claim and I don't

1 think we have to claim that it is a de novo
2 determination. But, it is certainly much more than a
3 review to see if the findings below were clearly
4 erroneous or anything as simple and detached as that.

5 JUSTICE ENGLAND: Mr. Frankel, just a second.
6 The last part of my question is, if the United States
7 Supreme Court is a different function -- and I take it
8 you are saying it is not that kind of a review -- how
9 do you explain Godfrey versus Georgia?

10 MR. FRANKEL: Your Honor, the capital sentencing
11 situation is so tense and so troublesome and so
12 delicate that the line between what the Supreme Court
13 does in normal cases and where it may dip into what
14 are normally State concerns is very hard to discern.
15 And I am not prepared to say I am an authority on that.
16 Normally, it's for the states to say what the rules of
17 evidence are. and what rules of procedure are. In
18 death cases that seems to change.

19 Now, what I would urge upon Your Honors is that
20 if there were no Supreme Court of the United States,
21 and if we assumed, as this petition does assume, that
22 this is the final tribunal; and if we assume, as this
23 petition does assume, Your Honors will realize that
24 lawyers -- lots of lawyers considering a grave matter
25 like this among other things considered where we go,

1 what kind of proceeding do we bring. Now, for a
2 variety of reasons, we're here and not in some low
3 Federal court.

4 But, one of those reasons I think we can fairly
5 state to Your Honors is that it really ought to be the
6 function of this Court to speak the final words for
7 this state about a matter involving the life and death
8 of people brought to court in this state. So, I would
9 say that this problem of whether this Court has been
10 forced to deal with so heavy a burden under a statute
11 that doesn't work with guidance on judgments that
12 ought to be legislative, with guidance that is
13 insufficient, under standards that are unacceptable,
14 the judgment about that subject ought to be this
15 Court's, without wondering what the people in
16 Washington will say by way of second-guessing or even
17 intrusion into what's normally state function.
18 Florida has a due process clause. Florida has a code
19 of judicial conduct.

20 JUSTICE ADKINS: Mr. Frankel?

21 MR. FRANKEL: Yes, sir.

22 JUSTICE ADKINS: Let me follow up something on
23 Justice England's questions concerning the newspaper
24 articles in relation to, say, a pending case.

25 As I understood your argument, in a newspaper

1 article or something of general dissemination, then
2 you can assume that perhaps defense counsel had equal
3 knowledge and that that's quite different than some-
4 thing that gets into the court file and the defense
5 attorney knows nothing about it. You were drawing
6 that distinction, as I recall; is that correct?

7 MR. FRANKEL: Yes, Your Honor.

8 JUSTICE ADKINS: Now, let me ask you: Concerned
9 citizens -- and admirably so -- throughout the state
10 of Florida become interested in the administration of
11 justice. And quite frequently, we get letters from
12 people that are not involved in the lawsuit at all,
13 but people who as citizens feel like they have the
14 right to write something to the Supreme Court -- some
15 are for and some against the death penalty. And it
16 being a matter of great public concern at the present
17 time, it's only natural that we could assume that such
18 correspondence would take place with these letters
19 coming in.

20 My query is: If a letter comes in and we are
21 aware of the letter, perhaps, or the contents, is that
22 something that could eventually invalidate the death
23 sentences by correspondence with citizens that are not
24 involved in the lawsuit?

25 MR. FRANKEL: If I have to give a short answer --

1 which I am not very good at -- I would say the answer
2 is no, Your Honor. That's a relatively insignificant
3 item very familiar to Bench and Bar and we all assume
4 correctly or not that judges are impervious to that.
5 I would add, Your Honors, if the Court were calling
6 upon me to advise that that should be made part of the
7 record in that case. If a letter comes in about
8 Bundy telling the Court what a villain he is and that
9 you ought to affirm his -- I don't know Bundy, but his
10 name was mentioned. He's as good an example as any --
11 and that his conviction ought to be confirmed for this,
12 that or the other reason, I think that that letter
13 should be made a part of that record. And I know that
14 sentencing judges in places where I have been do
15 disclose such communications to counsel. They are not
16 of great consequence, but even so, counsel, I believe,
17 are entitled to see them.

18 But, where you're dealing with a course of
19 action by the Court initiating communications,
20 requesting communications, receiving them; and receiving
21 them not from some volunteer letter writer, not from
22 the Tallahassee Democrat, but from the executive
23 branch of government, which taken in the large is the
24 adversary litigant in a case involving death.

25 JUSTICE OVERTON: Mr. Frankel, do you understand

1 the procedure in this state concerning presentence
2 investigation reports and where they are put?

3 MR. FRANKEL: Your Honor, I would not claim to be
4 an authority on where they are put. I believe they
5 wind up in the Department of Corrections at the moment,
6 but --

7 JUSTICE OVERTON: All right. Let me ask you
8 this. If a presentence investigation report is used
9 in the sentencing process, this Court should have it;
10 should it not?

11 MR. FRANKEL: I would think so, Your Honor, yes,
12 as part of its consideration of a death penalty. I
13 would think it's appropriate for the Court to have it
14 on the record with everybody knowing the Court has it,
15 not as an item not included in the formal record and
16 then solicited by the Court ex parte as has happened
17 in a number of the cases we cite.

18 JUSTICE OVERTON: Now, Mr. Frankel, if the Court
19 has requested a presentence -- a copy of a presentence
20 investigation report, and in answer to that request it
21 does not get the presentence investigation report but
22 gets the post-sentence investigation report, which it
23 subsequently returns, does that contaminate that
24 proceeding such that the death penalty could not be
25 imposed?

1 MR. FRANKEL: It might, Your Honor, because I
2 think -- I say it might because it would depend on
3 what then happened. If, for example, all --

4 JUSTICE OVERTON: Just the fact that they sent
5 us the wrong document, that it got into the court
6 file.

7 MR. FRANKEL: If it got into the court file and
8 it set here in that file for a period of months and
9 that was a file that the Justices of this Court
10 review in toto, then I would say that that might well
11 be sufficient in itself to invalidate the decision on
12 the appeal of that death sentence in that case. Again,
13 I'm -- with the Court's permission, since I have had
14 an explanation of these lights and I have a white one,
15 I am going to ask for a very few minutes to take care
16 of the unlikely contingency that Mr. Georgieff will
17 say something that I disagree with. But, I do want to
18 say that our claim rests on a very broad pattern of
19 conduct of its capital sentencing business by this
20 Court that in a strong expression a description of
21 what we do urge vitiates this appellate process which
22 is a keystone of the whole system and demonstrates the
23 invalidity of the system.

24 So, it is not easy to appreciate what we think
25 is the extent of our position by reducing it to one

1 case, though if we had only one case here, one
2 petitioner here, the position would be exactly the
3 same. It is an assault ultimately on the system, on
4 the statute under which Your Honors work and acclaim
5 that the statute doesn't work and that it's invalid.

6 JUSTICE ENGLAND: Mr. Frankel, I don't want you
7 to lose your rebuttal time either, and I will ask
8 Chief if he would allow me in my time a couple more
9 questions because the breadth of your petition is what
10 interests me.

11 In Appendix B that you have attached to the
12 petition, on Page 19 you have a document that pertains
13 to George Vasil. He's not a Petitioner in this case;
14 in fact, his sentence was reduced to life.

15 You also have on Page 29 a document from the
16 file of Benjamin Huckaby, who is not a Petitioner and
17 whose sentence was reduced to life.

18 On Page 76, you have one from Manning, who is
19 not a Petitioner and whose conviction was reversed and
20 remanded for a new trial.

21 Now, if you are right that the taint that you
22 have alleged in fact has occurred and so affects
23 capital sentencing process you have described in your
24 petition, "The practice of this Court has infected and
25 prejudicially skewed its review of every death sentence.

1 The capital sentencing process in Florida has become
2 tainted at its highest and most important judicial
3 level." Those are quotes from your petition, Page 13.

4 If that's correct, then what you are suggesting
5 in Section E, this proportionality review of your
6 petition, doesn't it follow that we must also vacate
7 every life sentence we have imposed on the ground that
8 that was a product of the same fatally defective
9 process?

10 MR. FRANKEL: Your Honor, it's certainly not our
11 claim and we don't represent anybody who is complaining
12 of a life sentence and would rather be killed.

13 JUSTICE ENGLAND: That's not the point.

14 MR. FRANKEL: The point -- well, let's -- we
15 claim the statute is invalid. What happened when
16 Florida's statute was invalidated in effect by Gregg?
17 You vacated all the death sentences.

18 CHIEF JUSTICE SUNDBERG: Furman.

19 MR. FRANKEL: Pardon? By Furman, I beg your
20 pardon. You vacated all the death sentences.

21 JUSTICE ENGLAND: But here you are making a
22 broader claim.

23 MR. FRANKEL: In a word, that's what we're asking
24 for.

25 JUSTICE ENGLAND: No, no, you have just told us

1 that you are making a very broad claim. And I under-
2 stand that to be that our process has been tainted.
3 That means -- and you talked about the life sentences.
4 That would, I think, mean that we have done something
5 equally egregious in reviewing the life sentences.
6 In fact, that's what you said earlier today.

7 Should we not, for the very reasons you allege--
8 this may be the right result -- start this process
9 over with everybody -- I'm going to the process now,
10 not the invalidity of the statute, which I understand
11 to be a different argument. Wouldn't that be the
12 logical conclusion of what you are suggesting?

13 MR. FRANKEL: No, Your Honor. Apart from whether
14 logic is the life of the law, which I won't bother us
15 with, we're complaining about death sentences. The
16 language has its limits and I have my limits in using
17 it. I am complaining about death sentences. We're
18 complaining about the process by which people are
19 sentenced to die.

20 Now, we compare them -- we compare them with
21 sentences to life imprisonment in order to bring out
22 and demonstrate the infirmity in the system, but the
23 infirmity of which we complain -- we wouldn't be here
24 if all of these people had life sentences. And a
25 court, after all, I assume hears the complaint of the

1 aggrieved people who come before it.

2 Our only complaint is not about how people are
3 sentenced to life imprisonment. That may be some
4 other case. We are complaining about how people are
5 put to death. And a part of that process is that some
6 people get what we want: Life imprisonment. It's not
7 something that the ordinary citizen asks for. But, in
8 these cases these Petitioners say that the sentence
9 they should have had could not be more than life
10 imprisonment because they could not validly be
11 sentenced to die. And when they attack the process,
12 they say it is a process that is inadequate for the
13 execution of defendants.

14 When the Supreme Court invalidated statute after
15 statute and talked about all of them as being the
16 grounds of decision between those who may live and
17 those who must die, it didn't say a word that impaired
18 or infected the life sentences of any of the states:
19 North Carolina, Georgia, Florida or anybody. Its
20 impact was on the death sentences.

21 Now, we claim under that jurisprudence, under
22 what's grown up as a kind of somber capital sentencing
23 body of constitutional law that Florida statute is
24 invalid and that the death sentences which confront
25 substantially all of these Petitioners -- there are

1 changes from day to day -- those death sentences should
2 be vacated.

3 JUSTICE ENGLAND: Two minor matters -- and I
4 appreciate your answer on that. I want to be clear on
5 one thing. I take it from the premise that it's really
6 irrelevant to your petitions that the information or
7 the materials we received were inadvertently or
8 advertently received. It really doesn't matter, as I
9 understand your argument; is that correct?

10 MR. FRANKEL: Your Honor, that would not be
11 quite correct. I don't think I would want to present
12 a hypothetical that we might press when the facts on
13 which we proceed are stronger than that. These are
14 advertent requests for information and receipts of
15 information.

16 JUSTICE ENGLAND: Well, no, I thought earlier in
17 your argument you said the mere presence in the file
18 of materials which were subject to consideration by
19 this Court in its total review function tainted the
20 process. It wouldn't seem to matter one way or the
21 other.

22 MR. FRANKEL: Your Honor, I must be using a lot
23 of words that I would like to retract. If that's what
24 I said, I didn't mean it.

25 JUSTICE ENGLAND: So, advertence does make a

1 . difference.

2 MR. FRANKEL: If somebody could prove that there
3 are things in this -- that all the things that we talk
4 about in this Court's files were never looked at by
5 any Justice, that somehow in reading the whole file --

6 JUSTICE ENGLAND: No, no, that's what we saw.
7 I am talking about how they got there for the moment.
8 I thought you had said it didn't matter how they got
9 there as long as they were there.

10 MR. FRANKEL: No, I didn't say that, Your Honor.
11 And if I did, I withdraw it. I said that the motives
12 didn't matter, that we believed the ultimate purposes
13 of the Court as a whole -- the Justices, the Clerk's
14 Office, whoever -- were purposes that could readily be
15 seen to be beneficent. And I said that didn't matter.

16 JUSTICE ENGLAND: So, it does matter then if all
17 the materials were on an ultimate fact-finding suppose
18 really occurred, all materials were the result of no
19 action of the Justices at all and all of it came, let's
20 say, from an assistant clerk's error in asking for the
21 wrong things -- hypothetical -- are you saying that
22 that inadvertence therefore eliminates the complaint
23 you have?

24 MR. FRANKEL: Your Honor, I take a minute to
25 embrace that hypothetical because it seems to me to be

1 a little way from the apparent facts as they emerge.
2 But, I accept it for the sake of argument. If some
3 assistant clerk repeatedly caused contaminating
4 materials to be in the files of this Court and if this
5 Court over a period of months or years, the Justices of
6 this Court reading every file from cover to cover
7 allowed that to continue and imposed death sentences in
8 the course of operating in that fashion, if one can
9 picture that degree of inadvertence in seven
10 distinguished jurists, then we would argue yes, that
11 invalidates the process.

12 JUSTICE ENGLAND: So, inadvertence doesn't matter.
13 Okay.

14 MR. FRANKEL: It could.

15 JUSTICE ENGLAND: I thought that's what you were
16 saying.

17 MR. FRANKEL: We claim much more than
18 inadvertence.

19 JUSTICE ENGLAND: I understand.

20 MR. FRANKEL: Driven to this situation where all
21 accidentally, all beknownst to the Justices, the stuff
22 gets into the files, the Justices read it year-in and
23 year-out, don't fire that assistant clerk, don't raise
24 a question how is this stuff getting into our files,
25 and go ahead and adjudicate in that fashion, just as

1 any other deleterious ex parte materials appearing in a
2 court record with that kind of irregularity would
3 lead to a determination of invalidity, we would say
4 those death sentences are certainly invalid. Thank
5 you, Your Honors.

6 CHIEF JUSTICE SUNDBERG: Counsel, Mr. Marshal, by
7 my count Justice England took up eight minutes of
8 your rebuttal. I assume that's what you had reference
9 to when you were referring to Mr. Georgieff. Is that
10 your count, Mr. Marshal? Would you reserve eight
11 minutes then in his rebuttal?

12 MR. FRANKEL: Your Honor, I certainly appreciate
13 that. I don't think Mr. Georgieff will cause me to
14 get up for any great length of time. Thank you.

15 MR. GEORGIEFF: Mr. Chief Justice, may it please
16 the Court, as you know our aspect of this comes down
17 to the Motion to Dismiss that we filed for the reasons
18 that we included in it and which I hope to articulate
19 here in the event that it isn't clear from what we did
20 file.

21 In response to Mr. Justice Overton's question, I
22 heard Judge Frankel say if you got a post-sentence
23 report as opposed to a pre- that you requested, which
24 should have been sent up but was not, depending on the
25 extent to which you looked at it and even though you

1 did send it back, you might or might not have to
2 reverse in this or that case. Now, you have heard
3 everything about "E" today in their petition. You
4 have heard nothing about the other claims.

5 We contend and we agree that if what they said
6 was so and if you could equate Gardner to a status
7 which included your function as well as that of the
8 trial courts, we agreed that that question was a valid
9 and proper one. We disagreed on the conclusion that
10 because there conceivably may be a circumstance in
11 which you will find one case to have been affected by
12 something extrinsic of the record, that you have got
13 to wipe it all out.

14 Well, that didn't happen in Gardner and would
15 you believe it didn't happen in Witherspoon. In
16 Witherspoon, the one that everybody knows about -- and,
17 by the way, a capital case, as was Gardner, and
18 Gardner was a Florida case -- nothing happened like
19 that. And, by the way, you asked the question about
20 Godfrey. I think, Mr. Justice England, you asked about
21 Godfrey. What is Godfrey all about if they are correct
22 in their position saying if we can demonstrate that
23 this is the general posture in which you find it --
24 which, by the way, they haven't done -- if they can do
25 that, then the whole must fall because we think we may

1 be able to show that one either could or should not
2 have been done.

3 Now, we submit that their argument has to fail
4 for that very reason. They tell you that we're
5 necessarily incomplete in what we urge here. Why? I
6 have no notion of why they're incomplete. Your files
7 are available to them. Files of the Department of
8 Corrections are available to them. They represent an
9 aggregation of some 80 legal minds, which perhaps in
10 the area of capital punishment, certainly in Florida,
11 are exceeded only by those on the staff of Jim Smith.

12 And I am telling you that there is no reason why
13 they couldn't come to you and plead the individual
14 cases. I think Mr. Justice England, you asked the
15 question, "Well, what happens and how do we reach the
16 cases that have long left our jurisdiction by the
17 issuance of a mandate, by this, by any other means you
18 want?" And, indeed, with Spinkelink, by death itself.
19 All right. If they file the individual petitions that
20 we contend are a requisite before anything intelligent
21 can be done about it, you can reach every one of them--
22 every one.

23 You cannot do it on the first one because there
24 are areas which simply do not get to it because they
25 can't put themselves into the posture of people who are

1 going to benefit in an aggregation where they can't
2 show the tie. We go back again to Gardner. What does
3 it mean to say that I am going to plead that something
4 may have been done to me because I think I can show
5 that something was done over here? That has nothing
6 necessarily to do with me.

7 I will give you circumstances not literal,
8 hypothetical. Let's assume for the moment that some-
9 body volunteers some information to you. You come by
10 it honestly, intelligently, any way you want. I am
11 not going to poison anybody's well. I don't know or
12 care what your motives are. I know and care what you
13 do. That's what's measured.

14 Washington never knows about your motives any-
15 more than we do. The whole point is what have you
16 done? If you did do something, it has got to be
17 evidenced by some activity on your part, by some
18 writing, by some utterance. If you didn't do it, I
19 want to know what has to result as to those cases in
20 which it was not done.

21 How about in Hargrave? In Hargrave didn't you
22 tell the Bench and the Bar that, you know, you told
23 the world, and I suppose that includes lawyers, Look,
24 what your function is is to review, not to impose the
25 sentence. You don't impose any sentences. You may

1 reduce them because you find that some of the
2 mitigating were improperly withheld, some of the
3 aggregating were improperly assessed. You may do
4 many, many things, but all you do is determine whether
5 what the trial court did squares with due process as
6 you understand it to be under Florida law and to the
7 extent that is necessary under Federal law.

8 When that leaves this Court, then the last
9 bastion is in Washington where they determine whether
10 what everybody did, including you as the terminal
11 treatise, whether what you did squares with Federal
12 law or collides with it to a degree necessary for them
13 to write something. If they do, then they strike it
14 down. If they are apprehensive, they remand it as
15 they did in Gardner or, when it came up in Witherspoon,
16 and as they will do again in Godfrey.

17 The whole point is, these are correcting
18 attitudes. You cannot correct if you strike it down.

19 They tell you the statute is infirmed because we
20 believe it has come to seem, you know, all of these,
21 just like Merlin with his magic wand, it seems as
22 though. What seems?

23 I don't believe that they can't find whatever
24 it is they need to plead and prove their case. If they
25 do, you have in front of you all the machinery necessary

1 by appointing a commissioner, by setting it down for
2 this type of hearing, by any type you want to find out
3 whether anything infirmed occurred.

4 Indeed, the whole posture of it is that you don't
5 need any information to aggravate a sentence above
6 what it is. They all come to you as death. So, if
7 there were to be any complaint that was intelligent
8 and based on something very real, it ought to come
9 from the people who wind up defending the death
10 sentences, that is to say us. But, you don't hear
11 that complaint from us.

12 He tells you that as you went along here the
13 reason that you have an infirmity of such magnitude
14 that you have to reverse all the cases is because the
15 ones that were reduced to life imprisonment maybe
16 don't matter, but those other people have a right to
17 say, "Well, now, wait a minute, because you messed up
18 the system, we think that all of it must go because
19 the taint simply cannot be removed."

20 What he is really telling you is that you didn't
21 make mistakes in all the cases, which puts us back to
22 where we were. If you have an individual complaint in
23 which you can demonstrate this, then very simply you
24 go ahead, make your allegations and if you can prove
25 them in this forum or one appointed by it or delegated,

1 then very simply you may have an opportunity to prevail.
2 And if you can prove it, perhaps you should. I do not
3 understand how on a tangent somebody should pick up the
4 benefit in a circumstance that conceivably could have
5 happened in some other case.

6 He tells you ex parte. What is ex parte? If
7 you look at Page 30 of the exhibits they furnished, you
8 will find a notice there about a PSI being requested.
9 And I notice that Mr. Marky's name is carried on the
10 left-hand margin as one of the parties who were told
11 about it and defense counsel on the other.

12 Now, is that ex parte? And that points up what
13 again I am telling you, that very simply they paint
14 either with too broad a brush or they don't want to use
15 a narrow one or they don't want to paint at all. They
16 want you to do it on the theory that the statute is
17 infirmed. The statute is not infirmed. You have said
18 so. United States Supreme Court has said so and that's
19 beyond peradventure.

20 If he suggests that what may have occurred over a
21 span of time in this tribunal, either deliberately or
22 otherwise, so infects the proceedings that it ruins
23 them all, I ask you about Gardner, I ask you about
24 Witherspoon and I ask you about Godfrey. They don't
25 all fall. We correct it if it's wrong, but we require

1 that they allege and prove that it is wrong as to
2 each individual whom they think it may be applied to,
3 not across the board.

4 JUSTICE ENGLAND: Mr. Georgieff, help me with my
5 recollection. There's a blurring in the argument that
6 I heard -- and I didn't get a chance to ask Mr. Frankel
7 to straighten it out -- between ex parte and record
8 and nonrecord, two different concepts, but they keep
9 getting pushed together.

10 With regard to record and nonrecord, am I correct--
11 I have a recollection that in some capital cases that
12 have come to this Court there have been motions by I
13 think public defenders or private counsel to supplement
14 the record with materials which were never in the trial
15 of the court below?

16 MR. GEORGIEFF: Yes, that has occurred, not too
17 frequent, but it has.

18 JUSTICE ENGLAND: If my recollection is accurate,
19 further some of those materials related to post-
20 sentence, either conversations or reports or something
21 in the Corrections system. I also believe, by the way,
22 the State -- your office -- has moved to dismiss all
23 those as being improper.

24 MR. GEORGIEFF: Most of the time unsuccessfully.

25 JUSTICE ENGLAND: Unsuccessfully?

1 MR. GEORGIEFF: Yes. Let me explain. I don't
2 want to be --

3 JUSTICE ENGLAND: No, I am just trying to recall
4 because if the point is valid about record and non-
5 record and that we're obliged not to have things that
6 are outside the file, I'm trying to relate that to the
7 request of some counsel to have things outside the
8 record file for our review. Your recollection is the
9 same as mine?

10 MR. GEORGIEFF: No, but if you are asking is
11 that an accurate recollection, the answer is yes, it
12 is.

13 JUSTICE ENGLAND: That's all I am really asking
14 you.

15 MR. GEORGIEFF: Now, I don't want to be strapped
16 to what it was you may particularly recall because I
17 couldn't give it to you now without doing a little bit
18 of searching, but, yes, that has occurred and really
19 it isn't all that infrequent. Matter of fact, at all
20 levels below capital cases it occurs with alarming
21 frequency.

22 Now, you know, whether it's done for this or that
23 means, he simply, I would assume by that and you by
24 your inquiry, is saying, well, if it's initiated by
25 counsel, then, one, it can't be ex parte; two, it can't

1 be anything but it is dehors the record, extrinsic,
2 whatever you want to call it. Now, I don't pretend
3 to know how you would resolve that, but for our
4 purposes --

5 CHIEF JUSTICE SUNDBERG: Let me ask you -- that's
6 a loose term, "dehors the record." The PSI, to my
7 knowledge, since I have been here, is carried in a
8 special part of the court file. It is never a part of
9 the record below; is it?

10 MR. GEORGIEFF: It depends on which it is, Judge.

11 CHIEF JUSTICE SUNDBERG: My recollection of the
12 criminal rule is that it is delivered by Parole and
13 Probation to the trial court for use during sentencing.
14 And that's in all cases.

15 MR. GEORGIEFF: Yes.

16 CHIEF JUSTICE SUNDBERG: Delivered back to Parole
17 and Probation and ultimately finds its way here to
18 Tallahassee.

19 MR. GEORGIEFF: Yes.

20 CHIEF JUSTICE SUNDBERG: And that doesn't become--
21 although it was utilized, everybody knows it was
22 utilized by the trial court -- it does not become a
23 part of the record because of the issue of confi-
24 dentiality as to the entire report.

25 MR. GEORGIEFF: No, of the proper record, you are

1 correct, sure.

2 CHIEF JUSTICE SUNDBERG: All right. And then
3 those then, where they are material, have come over to
4 this and repose in the court file in this Court;
5 correct?

6 MR. GEORGIEFF: Yes.

7 CHIEF JUSTICE SUNDBERG: Is that de hors the
8 record?

9 MR. GEORGIEFF: Not in my view. And certainly --
10 I don't even care if literally it falls within some-
11 thing that doesn't fit within the accordion file. It
12 isn't that that's contemplated by what it is they're
13 talking about. I guarantee you that that cannot be
14 error. The reason for that is very simply Counsel
15 knows about it because it's requested. Now, there may
16 be -- you know, there may be things in it that he
17 doesn't want in. But, the point is, he does know
18 about it. So, though it may be physically not
19 incorporated in what you and I generally refer to as
20 the record, he does know about it. So, it's not
21 extrinsic, unlike a post-sentence report, which might
22 come inadvertently, might come this way, that way.
23 When everything is done and let's say a court already
24 has the case, so in that regard it's similar and yet
25 it's different, if you understand what I mean.

1 CHIEF JUSTICE SUNDBERG: Unless that was
2 ascertainable, too, but, go ahead.

3 MR. GEORGIEFF: Yeah, but there may be a host
4 of situations, any one of which — now, you could go
5 into hypotheticals all day long. Somebody may say,
6 "Well, what in the name of heaven would anybody on
7 this Court be asking the Department of Corrections for
8 this, that, or the other?" Well, it may be that it's
9 a whole lot simpler to get the identical item from
10 them as opposed to the Clerk of the Circuit Court, as
11 you suggest, the PSI, which is late in arriving
12 sometimes 10, 15 weeks.

13 Now, I do not care where you got it, if you got
14 anything. It doesn't make any difference. The whole
15 point is when these people are ready and willing and
16 able to stand here and tell you that as to this case,
17 you did this, you did this, and you did this, and that
18 is legally impermissible under any view of due process
19 and you cannot find any reason to gainsay it, then
20 they have a basis on which to complain. They
21 certainly cannot do it under the "E" complaint, which
22 is the only thing they have argued, by the way. And
23 by limiting their argument to that, they have
24 illuminated what we said about the balance of the
25 claim, has to come in individually or it simply can't

1 make it. And I don't --

2 JUSTICE ENGLAND: I think they were limited a
3 little bit by the questions to the "E." I expected
4 they intended to get into A through F.

5 MR. GEORGIEFF: Perhaps so, but let's put it this
6 way. I will advance it affirmatively as our argument,
7 if that is the case; and if it isn't, I submit that
8 very simply, you know, petitions for habeas corpus
9 have been coming here for as long as the Court has
10 been here. None of that is frightening or awesome or
11 anything like that.

12 I don't like the idea of treating 123 individually
13 any more than you may or they may. But, the whole
14 point is I don't know how you can throw baby out with
15 bathwater by simply saying we think there may -- and,
16 by the way, they base it on what? On newspaper
17 articles and a handful of letters?

18 Now, I don't know which one of you would recall
19 that cases are won or lost on that as evidence. I do
20 not think so. And I don't think you will either.

21 Now, with regard to the complaint that's been
22 made on the "E": You can decide that without any
23 prejudice to the remaining people, whoever they may be,
24 whether there are 123, 122 or whatever increment. You
25 can do that on any basis you want without prejudice for

1 them to come back to you. And if they are able to
2 demonstrate a sufficient quantum of allegations and
3 visible proof that they fall somewhere under either of
4 the other five claims and thereby you can take care of
5 everything that is necessary. And I might add, by the
6 way, you know, if we're wrong, how come Pippin got his
7 case set down to life imprisonment last week, just
8 last week by this Court? Now, he was in the group and
9 that's a fait accompli; the decision is out. It's
10 reduced to life. What? If it was so infected that it
11 encompasses everybody, how did he wind up on the
12 beneficial end? That's a good question that they
13 ought to ask, and I don't know...

14 Ten days ago you were petitioned by Mr. Lacey
15 Mahon of Jacksonville, and an attorney by the name of
16 Hirsch, to include their cases in this aggregation of
17 123 with nothing but a blanket motion saying that
18 they, too, were on death row, and they, too, should be
19 permitted to be included in this group for disposition,
20 fair or foul, as to how it goes. You issued your
21 order on the 17th of October denying that.

22 Now, if we are wrong in our motion, that order
23 denying their motion was wrong, and they should have
24 been included. And I will say that if the position
25 advanced by Judge Frankel today is correct, once again,

1 their motion should have been granted. If it so
2 infects the whole proceeding that there is no escaping
3 it, then literally you have got to take in everybody,
4 even though you are confronted with what you inquired
5 about, Mr. Justice England. And that is to say, how
6 do we get to them unless we make it a blanket
7 proposition. And, in the writing, when you do write
8 it, if you do, tell them how Godfrey doesn't apply and
9 tell them how Gardner doesn't apply, tell them how
10 Witherspoon doesn't apply and all the others that don't
11 reach down to the bottom level and make it impossible
12 for anything to continue.

13 I might add, what about the handful of cases
14 that exist in your court where all you had is a notice
15 of appeal and absolutely nothing else? It simply has
16 not matured. Are those, too, infirmed? Are they, for
17 either the reasons advanced here by the Judge or any
18 that you have heard or any that you can think of? Now,
19 I don't know what went on if anything went on. What I
20 do know is if they suspected something did and if it is
21 of the nature or status that they tell you that it has
22 to be, then they know how to plead and they know how to
23 prove. And our position is very simply at least and
24 until they do, that there is no way that they can
25 prevail with the kind of claim that they have advanced

1 here under "E," and they certainly can't under the
2 others because they haven't argued them.

3 Now, you are not disposing of any individual
4 claims here. You are simply disposing of the general
5 claim that they belong under some sort of an umbrella,
6 magic or otherwise, which will give every one of them
7 the kind of relief that they say they want.

8 Now, if that's true, then very simply it leaves
9 intact all the rights that the others have to come in
10 and plead whenever and however and to what degree they
11 want to show that their claims have indeed been
12 violated. You have handled scores of thousands of them
13 over the years and you certainly know how to do it now.
14 Thank you.

15 CHIEF JUSTICE SUNDBERG: Mr. Frankel.

16 MR. FRANKEL: Your Honor, Mr. Georgieff has been
17 so becoming that I will try to use only seven of my
18 eight minutes.

19 CHIEF JUSTICE SUNDBERG: The Court thanks you.

20 MR. FRANKEL: I want to say that as to the number
21 of Petitioners, this, of course, is a question mooted
22 in the papers. Our broad contention is that there is
23 an invalid system under an invalid statute for the
24 imposition of death sentences, and we could, of course,
25 present that broad position starting with Mr. Brown by

1 these Petitioners one at a time. I'm advised that this
2 Court, like many other courts in America, is busy.
3 And believing that the broad claim is a responsible
4 and principled one that this Court would want to reach
5 on the merits, we thought it appropriate in the
6 service of the Court and of the Petitioners to bring
7 them on all at once. And we may be right in our
8 claim and we may be wrong, but it is presented in
9 earnest and in some detail as amplified in this oral
10 argument. And we do urge it upon the Court. It's
11 ripe for decision and we trust that the Court will
12 decide it.

13 There are cases in which a capital sentence goes
14 to the Supreme Court of the United States and only
15 that particular case is reversed. There are cases,
16 and their names are familiar to all of us, where a
17 particular petitioner goes to the Supreme Court of the
18 United States and the result of his effort is to
19 invalidate across the board the statute under which his
20 sentence was imposed.

21 And we say to Your Honors that we hope that the
22 law in Florida can be made satisfactorily in Florida;
23 and what the Supreme Court of the United States may or
24 may not do, ought not to be of particular concern at
25 this juncture. But, we do say, we are compelled to in

1 representing our clients, that we present this as a
2 Proffitt case, which was won by the prosecution in
3 Florida; as a Furman case, which was lost by Georgia;
4 as a case that does bring into question the whole
5 statutory scheme. And it's not possible, we think, to
6 avoid answering that question by talking about all the
7 horrendous consequences of one answer or another. If
8 we're right, of course, the motions of 10 days ago
9 could conveniently have been granted. But, it doesn't
10 make any difference because if we're right and if we
11 win, those two movants will get the relief to which
12 we claim they are entitled anyhow.

13 It doesn't advance this inquiry to wonder why
14 this Court may or may not have granted some motion
15 before it heard a full presentation of the issue that
16 we now place before you.

17 Now, on the question of what's ex parte and
18 what's in the record, I just want to add this, that
19 first I am informed, and I do not know for sure, but
20 a number of these spectators are very interested
21 legal people -- I am informed that characteristically
22 when they have moved to supplement the record,
23 including motions to supplement with psychiatric
24 information on their capital appeals, the motions have
25 been denied. I don't know whether that's uniformly

1 true or not. I don't think it matters.

2 What I do know-is that it is a whole world
3 different to have a motion on the record, copy to
4 Counsel, saying, let's make this piece of paper a
5 part of the record and fight about it from the situation
6 where a piece of paper finds its way into the record
7 and is considered and one party doesn't know anything
8 about it. One is ex parte. That's what the canons
9 and the Constitution denies. The other is not ex parte.
10 Whether the Court wants to add to its record or not is
11 a familiar kind of question that has a familiar kind
12 of answer.

13 Now, the way oral argument --

14 JUSTICE ENGLAND: Mr. Frankel?

15 MR. FRANKEL: Yes, sir.

16 JUSTICE ENGLAND: That leads me to ask your
17 request for the appointment of a commissioner to find
18 facts, isn't that really irrelevant? If you have got
19 enough in Exhibit B to indicate that in any file there
20 was a request from the Court for a document which
21 found its way in, haven't you made the point that you
22 are seeking and it is irrelevant how it got there, what
23 the motives were, what we did with it, how long it was
24 there? I am trying to really understand what you are
25 saying is important and what isn't.

1 MR. FRANKEL: I'm trying with mixed success to
2 help you understand the scope of our position, Your
3 Honor. We claim, we allege a pattern and practice.
4 We allege responsibly as Counsel that the materials in
5 this Appendix, however thick, are necessarily only
6 illustrative. We tell you because you know anyhow
7 that among the inquiries we would have to make in order
8 to state the full scope of this pattern and practice
9 are inquiries we have never made of Your Honors, among
10 other things.

11 JUSTICE ENGLAND: What difference? I thought
12 your point is --

13 MR. FRANKEL: Well, it makes a big difference.

14 JUSTICE ENGLAND: If the documents are there you
15 have already documented what you have in Appendix B --

16 MR. FRANKEL: Your Honor, if you accept our
17 allegations which are undenied that there is a broad
18 pattern and practice that this happens a lot, we
19 accept that basis of adjudication. If you agree and
20 as a pleading matter -- and we don't think an important
21 case like this necessarily goes off on pleadings --
22 but, if Mr. Georgieff agrees with us that this is a
23 pervasive pattern and practice in this Court to take in
24 these kind of materials and inferentially at least to
25 consider them, then we'd submit the case to you on that

1 basis.

2 JUSTICE ENGLAND: So, your request for a
3 commissioner is only to find out if it's a pervasive
4 practice?

5 MR. FRANKEL: Your Honor, it's only anticipatory
6 on the assumption that if our allegations in their full
7 breadth are denied and if issues of fact arise,
8 factual questions would be presented to be explored.
9 We claim a broad pattern and practice. If it's
10 admitted, well, then the claim is presented, it's
11 ripe and the facts we allege present issues of law.

12 If it's denied or disputed, evidentiary
13 questions arise.

14 JUSTICE ENGLAND: So, then it is not your
15 position that if it happened in one case, that's the
16 end of the capital sentencing process? It has to be a
17 pervasive practice.

18 MR. FRANKEL: Yes, Your Honor, that's our
19 position. Well, it has to have been a frequent
20 practice. And if the Court finds it material to
21 discriminate among words like "frequent, pervasive,
22 broad, general," for purposes of this legal question,
23 and if those refinements might relate to concrete facts,
24 we are prepared to assist the Court in finding those
25 facts the most expeditious way possible and that's what

1 the Master's about.

2 JUSTICE ENGLAND: But if the critical word is
3 "isolated," then you would have no complaint?

4 MR. FRANKEL: Well, we would have a complaint
5 and it depends on how isolated.

6 JUSTICE ENGLAND: Now, you're fudging the words
7 a little bit.

8 MR. FRANKEL: Your Honor, I am dealing with
9 somewhat hypothetical facts.

10 JUSTICE ENGLAND: I'm merely trying to find out
11 what the basis of your argument is because I thought
12 that your attack and your argument was focused on the
13 point that if it happened once, it proves the process
14 is wrong and our statute will not operate and must be
15 invalidated.

16 MR. FRANKEL: Your Honor, I would not permit
17 myself on behalf of these Petitioners to be reduced to
18 that position. If it happened once, I don't think I
19 would be standing here arguing that it invalidates the
20 statute. And we allege, and nobody denies yet, a
21 great deal more than once and that's the position on
22 which we submit the case to Your Honors now.

23 JUSTICE ENGLAND: But it wasn't really the
24 factual difference that is the focus point, Mr. Frankel,
25 I am really trying to grasp, because it is the

1 proportionality concept that you say is required of us
2 and that would be distorted by one as prejudicially
3 potentially as by 50.

4 MR. FRANKEL: No, Your Honor, it wouldn't any
5 more than -- what shall I say -- refusing to serve a
6 Chinese one day because some waitress had a headache
7 would show racial discrimination. We're talking about
8 a pattern and practice. Now, how many instances make
9 a pattern and practice could be a subject of
10 discussion. And, if it is to be discussed, we'll
11 discuss it.

12 I want to say, Your Honors, if I may that the
13 oral argument is for the service of the Court and it's
14 been directed and I appreciate that on behalf of the
15 clients to a great extent by questions from the Court.
16 I think it must be said in protection of the clients'
17 interests, however, that we do not abandon any of the
18 positions urged in this petition. It's not just "E."
19 It's the whole petition.

20 CHIEF JUSTICE SUNDBERG: That's understood,
21 Mr. Frankel.

22 MR. FRANKEL: Thank you, Your Honor.

23 CHIEF JUSTICE SUNDBERG: Thank you very much.
24 That concludes the Court's docket for today.

25 (Whereupon, the proceedings were concluded.)

* * *

CERTIFICATE OF REPORTER

STATE OF FLORIDA)

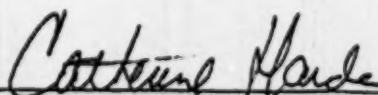
COUNTY OF LEON)

I, CATHERINE HARDEN, Official Court Reporter and
Notary Public in and for the State of Florida at Large:

DO HEREBY CERTIFY that the foregoing hearing was held
before me at the time and place therein designated; that
my shorthand notes were thereafter reduced to typewriting under
my supervision; and the foregoing pages numbered 1 through 64
are a true and correct record of the aforesaid proceedings.

I FURTHER CERTIFY that I am not a relative, employee,
attorney or counsel of any of the parties, nor relative or
employee of such attorney or counsel, or financially
interested in the foregoing action.

WITNESS MY HAND AND SEAL this, the 10th day of
November, A. D., 1980, IN THE CITY OF TALLAHASSEE, COUNTY OF
LEON, STATE OF FLORIDA.


CATHERINE HARDEN, CP, CSR, RPR
Official Court Reporter
Notary Public in and for the
State of Florida at Large.

My Commission expires: April 25, 1984.

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NO. 82-6923

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

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SUPREME COURT, U.S.

ALVIN BERNARD FORD,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Warden,
Florida State Prison, LOUIE L. WAINWRIGHT,
Secretary, Department of Offender Rehabilitation,
State of Florida; JIM SMITH, Attorney General,
State of Florida,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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1

QUESTIONS PRESENTED

I.

Whether the Eleventh Circuit's holding that the Florida Supreme Court's alleged receipt of non-record material in capital cases does not establish a constitutional violation in view of the express disclaimer of the use of the materials by the Florida Supreme Court raises a substantial Federal question?

II.

Whether the Eleventh Circuit's holding that the Florida Supreme Court's affirmance of the Petitioner's death sentence despite its striking eight of the five aggravating circumstances did not violate the Eighth Amendment raises a substantial Federal question, particularly in light of this Court's decision in Zant v. Stephens, ___ U.S. ___, No. 81-89 (Op. filed 6/22/83)?

III.

Whether the Contention that aggravating circumstances must outweigh mitigating factors beyond a reasonable doubt, raises a substantial Federal question in view of the Petitioner's procedural default in the State system and this Court's decision in Zant v. Stephens, ___ U.S. ___, No. 81-89 (Op. filed 6/22/83)?

IV.

Whether the Eleventh Circuit created conflict with precedent or raised a substantial Federal question by applying the procedural

bar of Wainwright v. Sykes, 433 U.S. 72
(1977) to the Petitioner's Lockett v. Ohio,
438 U.S. 586 (1978) claim?

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1982

ALVIN BERNARD FORD,

Petitioner,

-v-

CHARLES G. STRICKLAND, JR., Warden,
Florida State Prison, LOUIE L. WAINWRIGHT,
Secretary, Department of Offender Rehabilitation,
State of Florida; JIM SMITH, Attorney General,
State of Florida,

Respondents.

RESPONDENT'S BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court, Southern District of Florida, was entered on December 10, 1981. It is not reported, but it is included in the Petitioner's appendix at pages 104a - 118a. The panel opinion of the Eleventh Circuit Court of appeals is reported at 676 F. 2d 434 (11th Cir. 1982). The en banc opinion is reported at 696 F. 2d 804 (11th Cir. 1983).

JURISDICTION

Respondents accept the Petitioner's Jurisdictional Statement.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Respondents accept the Petitioner's Statement of the applicable provisions.

A. Preliminary Statement

The Petitioner was the Petitioner-Appellant in the Eleventh Circuit Court of Appeals and the Petitioner in a habeas corpus proceeding brought pursuant to 28 U.S.C. §2254 in the United States District Court for the Southern District of Florida. The Respondents were the Respondents-Appellees in the Eleventh Circuit and the Respondents in the District Court. In this pleading, the parties will be referred to as they appear before this Honorable Court.

The following symbols will be used:

"R" Record on Appeal in the Eleventh Circuit of the District Court pleadings

"SR" The supplemental record filed by the Petitioner in the Eleventh Circuit

"T" Transcript of the state trial held December 9-18, 1974

B. History of the Case

In 1974, the Petitioner was convicted of the crime of first degree murder in the Circuit Court of the Seventeenth Judicial Circuit, In and For Broward County, and sentenced to death. The Florida Supreme Court affirmed both the judgment and sentence on direct appeal. Ford v. State, 374 So. 2d 496 (Fla. 1979). This Court denied the Petitioner's Petition for Certiorari. Ford v. Florida, 445 U.S. 972 (1980).

The Petitioner was one of one hundred twenty three death row inmates who filed a petition for habeas corpus in the Florida Supreme Court, challenging that court's alleged practice of receiving non-record material in connection with its review of capital cases. The Court dismissed the Petition, Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), and this Court denied certiorari. Brown v. Wainwright, 454 U.S. 1000.

A death warrant for the Petitioner was signed by the Governor of Florida requiring that he be executed by December 11, 1981. The execution was scheduled for December 8. The Petitioner thereupon filed a Fla.R.Crim.P. 3.850 motion for post conviction relief

in the state trial court. The circuit court affirmed the trial court's order, and its order was appealed to the Florida Supreme Court. That court, after briefing and argument, rendered an opinion on December 4, 1981, affirming the trial Court's order and denying the request for a stay of execution. Ford v. State, 407 So. 2d 907 (Fla. 1981).

The Petitioner also filed a petition for habeas corpus in the United States District Court, Southern District of Florida, on December 1, 1981 (R 1-30). The Respondents' response was filed December 4, 1981 (R 65-101), and hearings were held by the Court on December 5 and 7, 1981. At the conclusion of the December 7 hearing, the Court denied relief and the request for a stay of execution. An order containing the Court's findings of fact and conclusions of law was entered (R 113-127). On that same date, the Eleventh Circuit granted a stay of execution to the Petitioner for the stated purpose of preserving his right to appellate review.

At the request of the Respondents, the appeal was expedited, and on April 15, 1982, a panel of the Eleventh Circuit entered an opinion affirming the District Court's denial of relief. Ford v. Strickland, 676 F. 2d 434 (11th Cir. 1982). The Court then sua sponte ordered a rehearing en banc. Supplemental briefs were filed, argument was heard, and on January 7, 1983, the Court rendered an opinion, again affirming the District Court's judgment. Ford v. Strickland, 696 F. 2d 804 (11th Cir. 1983). After rehearing was denied, the instant Petition was filed. A stay of the Eleventh Circuit's mandate was entered by Justice Powell on April 15, 1983, to be effective while the instant proceeding is pending.

C. Statement of the Facts

The State proved that the Petitioner, Alvin Bernard Ford, committed the crime of first degree murder of Fort Lauderdale police officer Dimitri Ilyankoff through the testimony of numerous witnesses. The murder occurred on July 21, 1974, when Ford, along with three accomplices, set out to rob the Red Lobster restaurant in Fort Lauderdale.

Two unimpeached eyewitnesses to the attempted robbery, Norman Phillips and Ethel Burgess, testified that Ford entered the restaurant with a gun and herded them into a freezer, after forcing Phillips to open the safe. (T 471-475, 791,798). Two of the co-defendants originally indicted with Ford, DeCosta and Lewis, testified that Ford had participated in planning the robbery (T 575-576, 655), entered the restaurant with a gun (T 581), and did not leave with them when they decided to go because the police were coming (T 584-586, 673-675). A statement by Ford was admitted into evidence. In the statement, Ford admitted he had participated in the robbery (T 1136-1137), but not the shooting (T 1137). Jacqueline Burrows was near the restaurant, heard shots, looked over, and saw a black male run to a patrol car, look inside, and run back to the restaurant (T 847). She heard another shot, and then he drove off in the police car. (T 847). Ford's fingerprints were found in the police vehicle when it was recovered (T 1050-1053). Two witnesses saw a man matching Ford's description get out of a police car and into a green Volkswagon (T 853, 680-861), and Ford was arrested in that car in Gainesville, Florida, at 9:00 P.M. that same date (T 1031).

Barbara Buchanan, who had been ordered by one of the robbers to stay inside a utility closet that had a slatted door (T 753), said she saw the other robbers leave before the officer arrived (T 755). When the officer came, he got out of his car, two shots were fired, and he fell (T 757). Ford came out of the restaurant, went to the car, and then back to the fallen officer and asked where his keys were. The officer said, "I don't know". (T 759). Ford picked^{up} the keys, shot the officer in the head, and drove off in his car (T 759).

At the sentencing phase of the Appellant's trial, the State did not introduce any additional evidence (T 1313). The defense called two lay witnesses, the Appellant's mother and a friend, who testified about his background (T 1313-1322), and a psychiatrist, Dr. Taubel, who testified that the Appellant had been depressed over employment problems (T 1333) and consequently started fast

a potential for rehabilitation and has moral standards (T 1339).

D. Facts Material to the Questions Presented

The Petitioner has asked this Court to grant certiorari to consider four of the seven issues which he raised in the Eleventh Circuit. As to these four issues, the members of the court were not in unanimous agreement. On Question One, "the Brown issue", the Court below voted 6-5 to affirm. On Question Two, the Florida Supreme Court's affirmance of the conviction although it struck three of the aggravating circumstances found by the trial judge, seven judges voted to affirm, two dissented, and two would certify a question of law to the State Supreme Court before ruling. Concerning Question Three, the standard of weighing aggravating and mitigating circumstances, nine judges voted to affirm, two dissented. Regarding Question Four, the instructions on mitigating circumstances, ten judges voted to affirm and one judge dissented.

The Respondents will review the facts underlying each issue.

(1) The "Brown" issue

The Petitioner was a party to the Florida Supreme Court case of Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981). In his District Court Petition for Habeas Corpus, he alleged the Florida Supreme Court had received non-record information in his case (R 20, 56-59), but he admitted, when pressed by the District Judge, that no such material was found in his Florida Supreme Court file (SR 7). The Supplemental Appendix the Petitioner has included with his Certiorari Petition, contains material from the Brown case which was never part of the record in this case and it should be disregarded, as well as any references to it in the Petition. The Eleventh Circuit's ruling was based on a reading of the Brown opinion.

(2) The Florida Supreme Court's affirmance of the Conviction although it struck three of the eight aggravating circumstances.

The trial court instructed the jury at the conclusion of the sentencing phase of the trial that they should consider whether the statutory eight/aggravating factors were applicable (T 1247-1248). The jury returned an advisory recommendation of death (T 1358). The trial

judge concurred in the recommendation and imposed the death sentence in a written order which is reproduced in the Florida Supreme Court's opinion on direct appeal Ford v. State, 374 So. 2d 496, 500-502, f.n. 1 (Fla. 1979). The trial court found that all eight statutory aggravating factors existed, while the Florida Supreme Court held that two of the factors were inapplicable and a third had been erroneously "doubled," see Provence v. State, 337 So. 2d 783 (Fla. 1976), but that there were five valid aggravating circumstances, no mitigating factors. As a result, the Court came to the "the inescapable conclusion that the proper sentence is the death penalty." Ford v. State, supra, 374 So. 2d at 503.

The Petitioner argued in the District Court and in the Eleventh Circuit that the Florida Supreme Court's affirmance was error because the jury's sentencing discretion was not adequately channeled and the process by which the sentence was imposed was rationally reviewable. The Petitioner never made the claim, as he does now, that the Florida Courts had disregarded nonstatutory mitigating circumstances contrary to Lockett v. Ohio, 438 U.S. 586 (1978).

(3) Standard of Weighing Aggravating and Mitigating Circumstances

The Petitioner never argued at trial or on direct appeal that the jury should have been instructed that it had to find the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt. Trial counsel did not object to the instructions as given (T 1349-1350), and it is further evident that he made a clear tactical choice to de-emphasize certain instructions (T 1309-1310). The Florida Rules of Criminal Procedure, Rule 3.390, require an objection to the jury instructions and provide that failure to do so forecloses appellate review. Consequently, when the issue was raised for the first time in the collateral attack, the State moved to strike it as procedurally barred, the trial court did so, and the Florida Supreme Court affirmed. Ford v. State, 407 So. 2d 907 (Fla. 1981).

the District Court therefore ruled that any claim of error concerning the sentencing phase jury instructions was barred by Wainwright v. Sykes, 433 U.S. 72 (1977) (R 116). The Respondents reasserted their procedural bar argument in the Eleventh Circuit. The Court, however, chose to rule on the merits with the exception of Judge Tjoflat, who agreed with the Respondents' Wainwright v. Sykes, supra, argument. The issue on which the Court ruled, however, is narrower than the one the Petitioner asserts in his Petition. Before the Eleventh Circuit, the Petitioner argued only that the aggravating circumstances must outweigh the mitigating beyond a reasonable doubt. He now attempts to argue that a reasonable doubt standard should apply to all capital sentencing determinations, an issue which was not presented to or decided by the Court below.

(4) Jury Instructions on Mitigating Circumstances

The Petitioner never objected to the wording of the jury instructions regarding the mitigating circumstances at the time of trial (T 1349-1350). Thus, Florida law prohibited his later collateral attack on the conviction on the ground of erroneous jury instructions Fla.R.Crim.P. 3.390. Accordingly, the Florida Supreme Court approved the trial court's order striking this ground from the Fla.R.Crim.P. 3.850 motion for post-conviction relief. Ford v. State, 407 So. 2d 907 (Fla. 1981).

In the habeas corpus proceeding, the District Court held the Petitioner's failure to timely object to the jury instructions barred his claim that the instructions unconstitutionally limited consideration of the mitigating factors. (R 116). The Eleventh Circuit in its en banc opinion affirmed. The majority held the Petitioner had failed to demonstrate "prejudice" accruing from his procedural default so as to come within an exception to the rule of Wainwright v. Sykes, 433 U.S. 72 (1977), and Judge Tyoflat, concurring, found out the Petitioner had not established "cause."

- I. THE ELEVENTH CIRCUIT'S HOLDING THAT THE FLORIDA SUPREME COURT'S ALLEGED RECEIPT OF NON-RECORD MATERIAL IN CAPITAL CASES DOES NOT ESTABLISH A CONSTITUTIONAL VIOLATION IN VIEW OF THE EXPRESS DISCLAIMER OF USE OF THE MATERIALS IN BROWN V. WAINWRIGHT, 392 SO. 2D 1327 (FLA. 1981) IS CONSISTENT WITH THIS COURT'S DECISION IN HARRIS V. RIVERA 454 U.S. 339 (1981), AND FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION.

The Petitioner contended below, as he does here, that the Florida Supreme Court was engaged in the ex parte regular systematic practice of soliciting and receiving extra-record psychiatric and psychological reports including presented reports, psychological screening reports, etc., and that this practice affected the appellate function of that court in capital cases. The Eleventh Circuit, in resolving his claim, relied on the Florida Supreme Court's decision in Brown v. Wainwright, 392 So. 2d 1327 (Fla. 1981), cert. denied 454 U.S. 1000 (1981). In Brown, the Petitioner and other capital appellants filed a Petition for Writ of Habeas Corpus in the Florida Supreme Court alleging the claimed violation and the Petition was denied. The Florida Supreme Court, in the Brown decision, said that its view of non-record information was irrelevant to its appellate function in capital cases as it bears on the operation of the statute or the validity of any sentence. Id. at 1331. "Factors or information outside the record play no part in our sentence review role...non-record information we may have seen, even though never presented to or considered by the judge, the jury, or counsel, plays no role in capital sentence 'review'." Id. at 1332-1333.

The Eleventh Circuit in the instant case accepted the Florida Supreme Court's statement in Brown that its sentence review function was not affected by its view of any non-record information as dispositive, "end[ing] the matter when addressed at the constitutional level." Ford v. Strickland, 696 F. 2d 804, 811 (11th Cir. 1983) (en banc). This holding is entirely in accord with the decision in Harris v. Rivera 454 U.S. 339 (1981), wherein this court emphasized the presumption of regularity, saying that a federal court may not require a state court to explain the reasons for its actions

unless it first determines those actions were unconstitutional. Insofar as any suggestion was made in that case that the trial judge may have considered inadmissible evidence, the court held that judges routinely hear evidence they are presumed to ignore when making decisions, and an apparent inconsistency in the trial judge's verdict did not give rise to an inference of irregularity sufficiently strong to overcome the well established presumption that judges adhere to basic rules of procedure. Likewise, in the instant case, both the plurality and Judge Tjoflat, concurring, found that the Florida Supreme Court's Brown decision makes it clear that non-record information was not used and did not affect the Court's appellate review function, and the mere reading of the material would not have Constitutional implications since judges are capable of disregarding what they should.

This Court has previously had occasion to consider the question presented herein when the Brown decision was before the Court on a Petition for Certiorari, which was denied. Brown v. Wainwright, 454 U.S. 1000 (1981). The reasons submitted by the present Petitioner as to why the Court should grant certiorari now to consider the same issue where it has previously declined to grant review are not persuasive. It is true that the Eleventh Circuit's decision will preclude the claim from being litigated further by individual capital defendants. This is as it should be, as the Florida Supreme Court's decision in Brown is dispositive and the Eleventh Circuit properly recognized it as such. The fact that the Eleventh Circuit did not render a single opinion but divided into a five judge plurality, one judge concurring, and five judges dissenting in three separate opinions, does not present any reason why this court should accept jurisdiction. The issue is one of significance only in Florida, it was thoroughly briefed and rebriefed before a panel and the full en banc court of appeals, and a decision was reached. If anything, the lengthy opinions by the judges below demonstrate the points involved have been fully aired, as completely as possible. The Petitioner lost, and so seeks another chance to win, but further litigation will establish nothing more.

The Eleventh Circuit's and the Florida Supreme Court's opinions do not diverge, as asserted by the Petitioner, on the question of whether Gardner v. Florida, 430 U.S. 349 (1977), applies to appellate as well as trial courts. The Florida Supreme Court in Brown held Gardner inapplicable since its function is to review and not impose death sentences. The Court then stated its sentence review function was unaffected by any non-record information it may have seen. The Eleventh Circuit did not decide the question of Gardner's applicability, for it assumed, without deciding, that the use of non-record material would be unconstitutional. It then went on to determine that the Florida Supreme Court's express disclaimer that its review function was unaffected was dispositive. Thus, the two opinions do not diverge or conflict; the Eleventh Circuit simply held it did not need to reach the issue of Gardner's applicability in order to decide the case.

The Petitioner's discussion of how the Brown case developed and his reference to his supplemental appendix which contains materials from Brown is irrelevant and should be disregarded. These materials were never made part of the record in the instant case.

Finally, the Petitioner's claim that the Florida Court did use non-record materials, citing to McCrae v. Wainwright, 422 So. 2d 824,827 (Fla. 1982), is unfounded. The Court in McCrae simply relied on its prior Brown decision to dispose of the defendant's ground for habeas corpus relief.

In sum, the Petition for Certiorari does not raise a substantial federal question. The Eleventh Circuit's resolution of the issue herein is consistent with this Court's decision in Harris v. Rivera, supra. Certiorari on the same question has already once been denied, Brown v. Wainwright, supra, and the Petitioner has shown no reason why it should be granted now. The thorough analysis of the issue by the Court below has adequately resolved the matter.

11. THE ELEVENTH CIRCUIT CORRECTLY DETERMINED THAT THE FLORIDA SUPREME COURT'S AFFIRMANCE OF THE PETITIONER'S DEATH SENTENCE WHEN IT UPHELD FIVE OF THE EIGHT AGGRAVATING CIRCUMSTANCES FOUND BY THE TRIAL JUDGE DID NOT VIOLATE THE EIGHTH AMENDMENT, AND PURSUANT TO THIS COURT'S DECISION IN ZANT V. STEPHENS, U.S. , NO. 81-89 (OPINION FILED JUNE 22, 1983), THE RULING DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION.

The Petitioner states the issue posed herein is similar to those in Barclay v. Florida, No. 81-6908, and Zant v. Stephens, No. 81-89, but with an added dimension - an alleged violation of Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). He then notes "the majority opinion below does not address the question actually presented by this case" (Petition p. 30). Small wonder, since the Court was not asked to address it. In his Brief for Petitioner-Appellant filed in the Eleventh Circuit on December 28, 1981, the Petitioner stated:

The issue presented by these facts is whether jury instructions permitting the consideration of statutory aggravating circumstances which have no evidentiary basis violate the Eight Amendment.

(Brf. for Petitioner-Appellant, p. 21). The Petitioner relied primarily on the Fifth Circuit's decisions in Henry v. Wainwright, 661 F. 2d 56 (5th Cir. 1981) and Stephens v. Zant, 631 F. 2d 397 (5th Cir. 1980). This section of the brief did not cite Lockett or argue anything about mitigating circumstances; rather, it argued the jury's discretion had been unconstitutionally broadened because it was instructed on eight aggravating factors when the Florida Supreme Court on appeal sustained only five. Subsequently, in his supplemental Brief for Petitioner-Appellant on Rehearing En Banc, the Petitioner argued there were two constitutional defects: the jury's sentencing discretion was inadequately guided and the process by which the sentence was imposed was not rationally reviewable. (Supp. brf. p. 30). Again, the argument was based on Henry v. Wainwright, supra and Stephens v. Zant. Therefore, the Petitioner's present argument that because evidence in mitigation pertaining to nonstatutory factors was presented, it was error to affirm the sentence when three of the aggravating factors were stricken on appeal, was not presented below and cannot be raised now as a basis for invoking this Court's certiorari jurisdiction.

As to the issue that was decided by the Eleventh Circuit, the Court's resolution of the matter is clearly consistent with this Court's opinion in Zant v. Stephens, ___ U.S. ___, No. 81-89 (Op. filed June 22, 1983), and thus no substantial Federal question is presented by this case. In the instant case, the jury was read the list of statutory aggravating circumstances and instructed to consider whether any of those factors, and only those factors, were applicable (Trial transcript pp. 1347-1348). The State presented no additional evidence at the sentencing phase of the trial (Trial Transcript p. 1313) and argued to the jury only the five factors that were later upheld. (Trial transcript pp. 1341-1342). The jury returned with a recommendation that the death sentence be imposed. The trial judge, who in Florida is the sentencer, entered a written order setting forth his findings as to the aggravating and mitigating factors [This order is reproduced in footnote 1 of the Florida Supreme Court's opinion on direct appeal. Ford v. State, 374 So. 2d 496, 500-502, f.n. 1 (Fla. 1979)]. The trial court found all eight statutory aggravating circumstances and no mitigating circumstances, statutory or otherwise, that would outweigh them. Thus, the Florida Supreme Court on direct appeal concluded the sentence should be affirmed, even though it found that three of the eight aggravating factors were erroneous, because there were no mitigating factors and the existence of five valid aggravating factors justified the sentence of death. Id. at 503.

The Eleventh Circuit found no Constitutional error since (1) no improper evidence was admitted or considered; (2) an error in the classification of evidence into eight rather than five factors did not Constitutionally infect the sentence; (3) the Florida Supreme Court's review was fair where there were valid aggravating factors and no mitigating, and (4) there was no error in instructing on all the factors where the jury was advised on the terms of the statute and the burden of proof. In concurring, Judge Godbold stated that he interpreted the Florida Supreme Court's affirmance as applying a harmless error rule which was correcting a misapplication of the statute, and such action passed

by the plurality as an alternative ground.

The Eleventh Circuit's decision is consistent with Zant v. Stephens, supra, wherein this Court held that once the jury had found two permissible aggravating circumstances, the fact it had found a third invalid factor did not affect the Constitutionality of the death penalty. This Court likewise rejected the Stromberg v. California, 283, U.S. 359 (1931) analysis set forth in footnote 19 of the Petition. Finally, the Court held that since the jury had not relied on any inadmissible evidence there was no constitutional infirmity in the instruction on the invalid factor, and a rule of automatic reversal is not required.

In the instant case, as in Stephens, no improper evidence was considered by either the judge or the jury. The jury was not even instructed on invalid factors; it was simply advised to consider whether one or more of the eight statutory aggravating factors applied. The fact that the judge cast admissible evidence into eight factors rather than five was not Constitutional error requiring automatic reversal by the Florida Supreme Court. Throughout this proceeding, the Petitioner has primarily relied on the Fifth circuit's decision in Stephens v. Zant, supra. As that case has now been reversed by this Court, the decision in the instant case was clearly correct and it does not present a substantial federal question. If this Court does grant certiorari, it should be for the limited purpose of summarily vacating that portion of the opinion below which remands the case to the district court for consideration of whether Barclay v. Florida, 411 So. 2d 1310 (Fla. 1982), cert. pending, Case No. 81-6908, may affect the denial of relief in this case Ford v. Strickland, 696 F. 2d 804,807 (11th Cir. 1983) (en banc). Such action would avoid yet another round of appeals through the District and Appellate Courts.

III. PETITIONER'S CONTENTION THAT A REASONABLE DOUBT STANDARD SHOULD BE IMPOSED ON THE DETERMINATION OF WHETHER THE AGGRAVATING FACTORS OUTWEIGH THE MITIGATING FACTORS FAILS TO RAISE A SUBSTANTIAL FEDERAL QUESTION, AS THIS DETERMINATION IS A WEIGHING PROCESS NOT SUSCEPTIBLE TO A STANDARD OF PROOF AND THE PETITIONER PROCEDURALLY DEFAULTED IN THE STATE COURT SYSTEM.

In asking this Court to grant certiorari to decide whether the reasonable doubt standard should apply to capital sentencing determinations, the Petitioner has set forth an issue that was not decided by the Court below. The narrow issue before the Eleventh Circuit was whether, during the sentencing phase of a capital trial, the jury should be instructed that it must find and the Florida Statute requires that the aggravating factors outweigh the mitigating circumstances beyond a reasonable doubt.^{1/} The broader issue now presented by the Petitioner regarding all capital sentencing determinations (Petition p. 33) cannot be considered in this proceeding since it was not argued in this manner in the appellate court.

Moreover, as Judge Tjoflat pointed out in his concurring opinion, Id. at 827, 830-831, the Eleventh Circuit should not have decided the merits of the issue before it concerning whether the aggravating factors must outweigh the mitigating beyond a reasonable doubt due to the Petitioner's procedural default in the State Court system. Wainwright v. Sykes, 433 U.S. 72 (1977). This claim was not made at trial or on direct appeal, but presented for the first time in the Petitioner's Fla.R.Crim.P. 3.850 motion for post-conviction relief. The state circuit court refused to consider the claim on its merits because it should have been raised, if at all, during trial and on direct appeal. The Florida Supreme Court affirmed the circuit court's holding that the issue was inappropriate for collateral attack. Ford v. State, 407 So. 2d 907, 908 (Fla. 1981). The Petitioner has demonstrated no cause

^{1/} The Court refused to consider the Petitioner's claim, raised for the first time in his supplemental brief, that his sentence was unconstitutional for failure to require the proof of the aggravating circumstances beyond a reasonable doubt since it was never specifically raised or briefed before the panel. Ford v. Strickland, supra, 696 F. 2d at 819.

and prejudice for his procedural default, and the Eleventh Circuit need not have ever reached the merits of his claim. Accordingly, certiorari should not be granted since the Petitioner's argument is foreclosed by Wainwright v. Sykes, Supra.

The issue of whether the aggravating circumstances must outweigh the mitigating circumstances beyond a reasonable doubt does not, in any event, raise a substantial Federal question, particularly in view of this Court's decision in Zant v. Stephens, ___ U.S. ___, Case No. 81-89 (Op. filed June 22, 1983). In Stephens, this Court held that specific standards for balancing aggravating against mitigating circumstances are not constitutionally required, citing to its earlier opinion in Jurek v. Texas, 428 U.S. 262 (1976). The majority opinion in the court below held (1) the fact that aggravating factors must outweigh mitigating factors is not an element of a crime but designed to channel the sentencer's discretion; (2) the Florida death penalty statute, which has upheld as constitutional by the Court in Proffitt v. Florida, 428 U.S. 242 (1976), was followed; and (3) the process of weighing circumstances is a matter for the judge and jury which is not susceptible to a standard of proof by either party.

The Eleventh Circuit's opinion is thus consistent with Zant v. Stephens, Supra, and with this Court's statement in Proffitt v. Florida, Supra, at 258, that:

The directions given to the judge and jury by the Florida Statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstance of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

See also, Gray v. Lucas, 677 F 2d 1086, 1105-1106 (5th Cir. 1982); op. on reh. 685 F 2d 139 (5th Cir. 1982), cert. denied ___ U.S. ___, Case No. 82-6172 [33 Cr L 4031]; Evans v. Britton, 472 F Supp 707, 720-721 (S D Ala. 1979).

It is evident the Petitioner has failed to demonstrate the existence of a substantial Federal question which would serve as a basis for this Court's certiorari review. Rule 17(1)(c) Supreme Court Rules 1980.

IV. THE ELEVENTH CIRCUIT'S DECISION IN THE INSTANT CASE CORRECTLY IMPOSED THE PROCEDURAL BAR OF WAINWRIGHT V. SYKES, 433 U.S. 72 (1977) ON THE PETITIONER'S LOCKETT V. OHIO, 438 U.S. 586 (1978) CLAIM, AND IN SO DOING IT NEITHER CREATED CONFLICT NOR DECIDED A SUBSTANTIAL FEDERAL QUESTION.

The decision of the Court below with regard to the jury instructions on mitigating circumstances neither conflicts with precedent nor raises a substantial Federal question and thus this Court need not grant certiorari.

First, as the Eleventh Circuit recognized, the Petitioner committed a procedural default by failing to raise, either at trial or on direct appeal, the issue of whether the trial court's instructions to the jury limited its consideration of the mitigating circumstances to those listed in the statute. When he did raise the issue in his Fla.R.Crim.P. 3.850 motion, the state trial judge declined to hear it because it was inappropriate for collateral attack. The Florida Supreme Court affirmed. Ford v. State, 407 So. 2d 907, 908 (Fla. 1981) [Petitioner's claim in note 27 that in fact there is no procedural default rule in Florida, a claim he has never previously alleged, is specious; the rule is clearly announced in Florida Supreme Court decisions, e.g. Witt v. State, 387 So. 2d 922 (Fla. 1980), Hargrave v. State, 396 So. 2d 1127 (Fla. 1981), and it was applied in this case. If it has not been applied in every similar situation, that provides the Petitioner no basis for relief. Howard v. Kentucky, 200 U.S. 164, 173 (1906). Beck v. Washington, 369 U.S. 541 (1962)] Therefore, the District Court and the Eleventh Circuit properly recognized that pursuant to this Court's opinion in Wainwright v. Sykes, 433 U.S. 72 (1977), the Petitioner was barred due to his procedural default from litigating the merits of the issue.

The majority of the members of the Court below held that the Petitioner had not established prejudice under the "cause and prejudice" exception of Wainwright v. Sykes, Supra, so they did not discuss whether the Petitioner had shown cause. Ford v. Strickland, Supra, 696 F 2d at 812-813. Judge Tjoflat, concurring at pages 828-829 of the opinion, pointed out that the Petitioner had not satisfied the "cause" prong of the exception so the Lockett v. Ohio, 438 U.S. 586 (1978) claim was barred without regard to prejudice. Judge Tjoflat's reasoning is correct, pursuant to this Court's decision in Engle v. Issac, 456 U.S. 107 (1982), and the Fifth Circuit's decisions in Madeley v. Estelle, 606 F 2d 560 (5th Cir. 1979) and Tyler v. Phelps, 643 F 2d 1095 (5th Cir. 1981). Therefore, it was not necessary for the majority to analyze the prejudice aspect, but in any event, their analysis was not in conflict with the cases cited by the Petitioner. In United States v. Frady, 456 U.S. 152 (1982), this Court held that in the case of jury instructions, the degree of prejudice must be such that the ailing instruction infected the entire trial. Cf. Henderson v. Kibbe, 431 U.S. 145 (1977). As the majority pointed out, under the circumstances of the case, a reasonable juror would not have perceived any restriction on the use of mitigating evidence and the Petitioner was not restricted in his presentation of evidence and argument.

The instant case is distinguishable from and not in conflict with the Fifth Circuit's decision in Washington v. Watkins, 655 F 2d 1346 (1981). In Washington, the state's Wainwright v. Sykes, Supra, argument was not considered because the State had failed to make the point in the lower court and the State Courts had not applied a procedural bar, but had addressed the merits of the claim. Washington v. Watkins, Supra, 655 F 2d at 1368. By contrast, in the instant case it is undisputed that the Respondent's Wainwright v. Sykes argument was properly preserved and the Eleventh Circuit applied its procedural bar to the Petitioner's Lockett v. Ohio, 438 U.S. 586 (1978) claim. This fact alone is

sufficient to distinguish the Eleventh Circuit's Ford decision from Washington v. Watkins and thus this court should decline to exercise its certiorari jurisdiction.


Additionally, as the majority pointed out, the language used in the instructions in Washington was different from that used in the instant case, for in Washington the jury was confined to considering "one or more of the preceding elements of mitigation." Id. at 1368, Cited in Ford v. Strickland, Supra, 696 F. 2d at 813. In the instant case, the instruction followed the language of the statute, which this Court interpreted in Proffitt v. Florida, 428 U.S. 242, 250 n. 8 (1976) as non-limiting. The Florida Supreme Court has also held, in Songer v. State, 365 So. 2d 696 (Fla. 1978), that the mitigating circumstances are not limited to those in the statute. One further point requires comment: in Florida unlike Mississippi the jury's role is advisory and it is the judge who actually sentences. There is no question in this case that the judge understood his obligation, since in his sentencing order he stated there were no mitigating factors, statutory or otherwise, to outweigh the aggravating.

Therefore, the Eleventh Circuit's decision in the present case does not conflict with Washington v. Watkins, Supra, nor with prior decisions of this Court. The petition for certiorari on this ground does not meet any of the considerations governing review in certiorari, Rule 17, Supreme Court Rules (1980), and it should be denied.

WHEREFORE, based upon the foregoing reasons and authorities cited therein, the Respondents request that the Petition for Certiorari be denied.

Respectfully submitted,

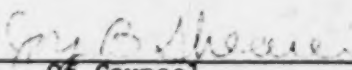
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished this 7 day of July, 1983 by mail to Marvin E. Frankel, Kramer, Levin, Nessen, Kamin & Frankel, 919 Third Avenue, New York, New York 10022; Richard H. Burr, III, 224 Datura Street, 13th Floor, West Palm Beach, Florida 33401 and Laurin A. Wollan, Jr., 1515 Hickory Avenue, Tallahassee, Florida 32303.


Of Counsel